

LEGAL EFFECTS
OF
WAR

Printed in Great Britain at the University Press, Cambridge
(Brooke Crutchley, University Printer)
and published by the Cambridge University Press
(Cambridge, and Bentley House, London)
Agents for U.S.A., Canada, and India: Macmillan

First Edition 1920
Second Edition 1944
Third Edition 1948

LEGAL EFFECTS
OF
WAR

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THIRD EDITION

CAMBRIDGE
AT THE UNIVERSITY PRESS

1948

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To
HAROLD COOKE GUTTERIDGE

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PREFACE TO THE SECOND EDITION

The first edition of this book, published in 1920, consisted of 168 pages. This edition numbers 416 and, with the exception of chapter II of the first edition which now becomes an Appendix, very little of that edition remains.

My general impression is that the judges who were responsible for the decisions given during the War of 1914 to 1918, and for some years thereafter, established the principles of this branch of the law well and truly, without a great deal of help from their predecessors. The decisions of the present war have for the most part applied and underlined these principles, and few cases of first-rate legal importance have arisen. The *Sovfracht* or 'Waalhaven' case upon the enemy occupation of Holland, and the *Fibrosa* case upon the consequences of frustration, are two of them.

This book is an attempt to study the impact of war upon the principles of our law and is in no sense a *vade mecum* through the tangled undergrowth of war-time legislation. Other books are available for that purpose. The effect of war upon the Procedural Status of Enemies and upon Contracts occupies a large part of the volume. Chapter 4 deals with the general principles underlying the effect of war upon Contracts other than the principles of Frustration, which forms the subject of chapter 6, and later chapters apply those principles to Particular Contracts. The main legal contribution of the present war will probably lie amongst the problems which have arisen from the occupation of many countries by our enemies and the exile of the Governments of most of those countries. Chapters 17 and 18 attempt to assemble some of the material relevant to these problems and to indicate the solution of some of them.

As I do not wish to be thought to under-estimate the value of other volumes dealing with the effects of war, I must say that it is only because I have found it easier to work out my own views upon these matters without consulting contemporary books that I have so rarely referred to them. It is inevitable that a considerable part of this book should be speculative and that only a part of my speculations should be accepted. I shall be content if I have made any contribution, however modest, to the solution of unsolved problems.

Help has come from many friends, and in thanking them all sincerely I shall only name those of my greater benefactors who allow me to do

so—Mr W. E. Beckett, C.M.G., and Mr B. Honour, M.C. Exercising one of the last surviving privileges of primogeniture, I induced Mr W. L. McNair, K.C., in spite of the pressure of his present official duties, to read the proofs and thereby to render me great service. None of these friendly critics can be regarded as being in any way responsible for any opinions expressed in the book.

Finally, I must thank the Editors of the *Law Quarterly Review*, the *Journal of Comparative Legislation and International Law* and the *Cambridge Law Journal* for leave to make use of articles of mine published by them, the Controller of His Majesty's Stationery Office and the Incorporated Council of Law Reporting for leave to print extracts from the publications for which they are responsible, the Cambridge University Press for its skill in mitigating the limitations of war-time publication, and my secretary, Miss B. Kay, for patient and, at times, almost palaeographic help in the preparation of the typescript for the press.

A. D. McN.

3 ESSEX COURT, TEMPLE

November 1943

PREFACE TO THE THIRD EDITION

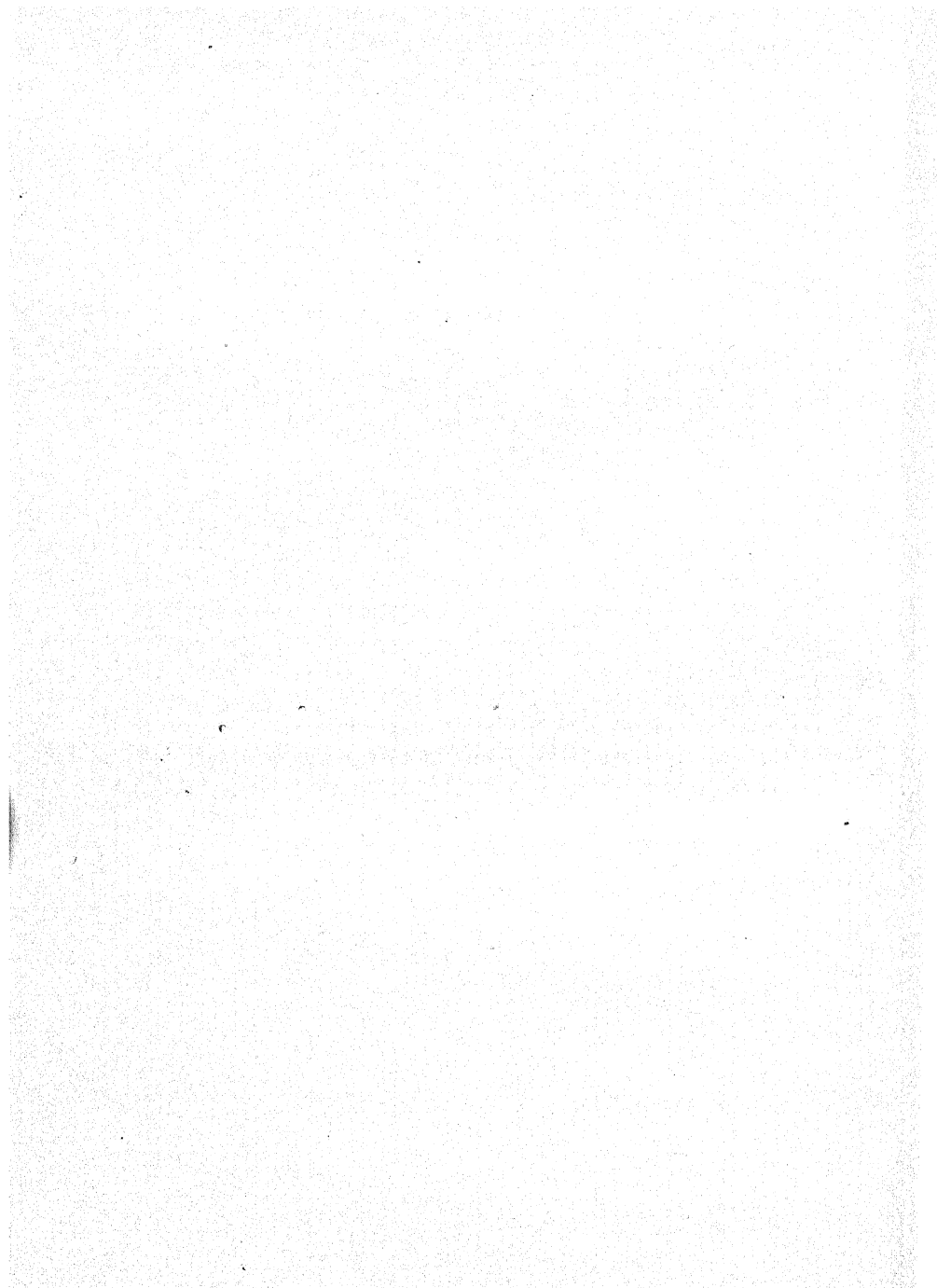
I should have preferred to postpone this edition until such part of the war-time legislation as is intended to be temporary had entirely disappeared. At present much of it is still in existence and the law changes from month to month. As the book attempts to state the law both as it is, and as it was during the recent war, it refers to many statutes, regulations and orders of a temporary character which either have already expired or been repealed or will shortly expire or be repealed. In these circumstances the reader is warned that he must not infer from the mention of a statute, order or regulation that it is still in force. The only safe course in a period of transition like the present is to consult the responsible Department at the material time.

I have frequently referred to the War of 1939 to 1945 as 'recent', but I must remind readers of what is said on pages 5 and 6 as to the end of war, and the necessity of ascertaining the precise position in the case of each of our recent enemies.

I must gratefully acknowledge the help of Mr John Megaw in drawing my attention to a number of points requiring revision. It has been found possible to preserve the pagination of the second edition except in regard to pages 191 to 238. I have added to the Appendix an article on 'The Law Reform (Frustrated Contracts) Act, 1943', which appeared in the *Law Quarterly Review*, an article on 'The Requisitioning of Merchant Ships', which appeared in the *Journal of Comparative Legislation*, and two recent statutes not readily accessible to foreign readers.

A. D. McN.

August 1947



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ABBREVIATIONS

Oppenheim=Oppenheim, *International Law*, vol. i (6th ed.); vol. ii (6th ed. revised), both by Lauterpacht.

Hall=Hall, *International Law* (8th ed.), by A. Pearce Higgins.

Annual Digest=Annual Digest and Reports of Public International Law Cases, 1919-1942, 10 volumes, and Supplementary Volume 1919-1942, by Lauterpacht and others.

Hyde=Hyde, *International Law*, Second Revised Edition, 1945, vols. i, ii and iii (the leading American authority).

Dicey=Dicey, *Conflict of Laws* (5th ed.), by A. Berriedale Keith.

CHAPTER 1

WHAT IS WAR?

For most, but not all,¹ purposes of discussion in this book, we shall find it necessary to know the technical meaning of the word 'war'.² An examination of the cases will shew us (a) that fighting can take place without war, (b) that war can exist without fighting, and (c) that, at any rate when Great Britain³ is one of the combatant parties, it is for the Government to say whether we are at war or not.⁴ We shall discuss the matter under three headings:

1. When Great Britain is a party to the conflict.
2. When she is a third party faced by a conflict between two other States.
3. When there is civil war or insurrection in a foreign country.

¹ For instance, Frustration: see later, chapter 6.

² We are here concerned not with civil war but with international war, and more particularly with the municipal consequences of international war. Accordingly, we shall not discuss the highly controversial question of what international law regards as war and in particular whether reprisals amount to war, and how far, when two countries are fighting one another and insist that they are not at war, other States are considered to have a right of judgment in the matter. See Oppenheim, ii, §§ 53 *et seq.*, and also McNair in *Transactions of Grotius Society*, xi (1926), pp. 29-50; Briery in *Cambridge Law Journal*, iv (1932), pp. 308-319; Fischer Williams, *ibid.* v (1933), pp. 1-21; Lauterpacht in *American Journal of International Law*, xxviii (1934), pp. 43-60; and other authorities cited in the same *Journal*, xxxiv (1940), p. 306. Nor are we concerned here, though it will become necessary to refer to the matter later, with the meaning to be attributed to such expressions as 'war', 'hostilities', 'warlike operations', etc., when occurring in policies of insurance, charterparties, and other written contracts. That is a question of construction.

³ It is convenient to use the expression 'Great Britain' or 'United Kingdom' so as not to raise the question of the extent of the area of the British Empire (including the British Commonwealth of Nations) which may be affected by the outbreak of war. Upon the question whether the British Empire can legally be only in part in a state of war, and upon the methods by which the Self-Governing Dominions (other than Eire) entered the recent war, see Oppenheim, i, § 94 *bb*, and Duncan Hall in *The British Commonwealth at War* (1943), pp. 9-80 (New York).

⁴ For other instances of the practice of the Courts in seeking and following the opinion of the Executive branch of government in matters containing a foreign or international element, see the following cases: *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149, and *Duff Development Co. v. Kelantan Government* [1924] A.C. 797 (as to the sovereign status of a foreign State and its monarch); *Janson v. Driefontein Consolidated Mines* [1902] A.C. at p. 500 (as to the beginning and end of a state of war); *A. M. Luther Co. v. James Sagor & Co.* [1921] 3 K.B. 532 (as to the recognition, *de facto* or *de jure*, of a foreign Government); *Engelke v. Musmann* [1928] A.C. 433 (where the House of Lords accepted as conclusive a Crown statement as to a defendant's diplomatic status). See also *The Bolletta* (1809) Edwards, 171; *Foster v. Globe Venture Syndicate* [1900] 1 Ch. 811; *In re Suarez* [1918] 1 Ch. 176.

1. WHEN GREAT BRITAIN IS A PARTY TO THE CONFLICT

Outbreak of war. War being waged by the Crown in the exercise of its prerogative, we are entitled to look to the Executive to inform us—either by proclamation or by some other express and overt act—when a state of war exists.¹ That is obviously the best evidence, and in modern times is generally available. In 1914 we had the Proclamations of August 5, 1914, relating to Germany, and of August 12, 1914, relating to Austria-Hungary, and later the Foreign Office notifications of November 5, 1914, relating to Turkey, and of October 15, 1915, relating to Bulgaria. The *London Gazette* of September 3, 1939, being the Third Supplement to the *Gazette* of September 1, 1939, contains the following statement:

‘It is notified that a state of war exists between His Majesty and Germany as from 11 o’clock A.M., to-day, the 3rd September, 1939.’

Our own legal authority is remarkably consistent on this point.

In the year 1480 we find Brian C.J., in an action of debt on an obligation to which a plea of alien enemy was raised,² saying:

‘It seems to me you ought to show how the league was broken, for that is matter of record; for if at one time there was a league between the King of this country and the King of Denmark, notwithstanding that all persons in England wanted to make war with those in Denmark, if our Lord the King would not assent to it, it would not be called war; but if there be no hostilities in fact, but the peace is broken between the King of Denmark and our Lord the King, as by ambassadors or otherwise, in that case where the peace and the league are broken [there is war].’

In 1779, in *The Maria Magdalena*,³ a case in which cargo belonging to London merchants consigned by a Swedish ship to France was condemned on the ground of trading with the enemy, it appears that there had been a ‘declaration of general reprisals’ by the Crown against

¹ A declaration of war, either specifically in that form or in the form of a conditional ultimatum, is not required by international law, though since 1907 it has been required by Hague Convention III of all the States who are parties to that Convention at the relevant time (Pearce Higgins’ *Hague Peace Conferences*, p. 198). For the opening of the Russo-Japanese War, see Pitt Cobbett’s *Leading Cases and Opinions on International Law* (5th ed.), ii, p. 12. On the question whether war broke out *ipso facto* between Japan and the U.S.A. the moment that Pearl Harbour was attacked, see *Savage v. Sun Life Assurance Co.* (1944) 57 F. Supp. 620; *Rosenau v. Idaho Mutual Benefit Association* (1944) 145 P. 2d. 227; and *West v. Palmetto State Life Insurance Co.* (1943) 25 S.E. 2d. 475.

² Y.B. Hil. 19 Edw. IV, f. 6.

³ Hay & Marriott 247; 1 English Prize Cases, 20.

France, but no actual declaration of war by the British Crown, though something of the sort had been issued by the French Crown. Sir James Marriott, as Judge of the Prize Court, condemned the cargo, holding as 'Bynkershoek has a whole chapter to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation'.

In 1799, in *The Hoop*,¹ we find Lord Stowell saying that 'by the law and constitution of this country the sovereign alone has the power of declaring war and peace'.

In 1809, in *The Pelican*,² upon the question arising whether a particular part of a certain island had been emancipated from French dominion so as to cease to be enemy territory, Sir William Grant, in delivering the judgment of the Court of Appeal in Prize, said:

'It always belongs to the Government of the country to determine in what relation any other country stands towards it; that is a point upon which Courts of Justice cannot decide.'

In 1811, in *Muller v. Thompson*,³ Lord Ellenborough C.J., in answering a plea that a policy of insurance was illegal because it gave the ship liberty to proceed to Königsberg, said:

'Königsberg belongs to Prussia. We are placed in a strange anomalous situation with regard to that country and others on the continent; but it is not that of war. We have published no declaration of war against Prussia; we have not issued letters of marque and reprisals; we have not done any act of hostility. Therefore, though the relations of amity are not very strong between us, yet we are not at war with Prussia, and a voyage from England to a Prussian Port is not illegal,'

thus recognizing that war has a technical meaning which was not satisfied by the facts in the case before him.

In 1812, in *Blackburne v. Thompson*,⁴ Lord Ellenborough C.J. accepted the statement by Sir William Grant, quoted above, that

'it belongs to the Government of the country to determine in what relation of peace or war any other country stands towards it; and that

¹ 1 C. Rob. 196, 199; 1 English Prize Cases, at p. 106. *De facto* hostilities between two foreign States are discussed in *The Two Friends* (1799), 1 C. Rob. 271; 1 English Prize Cases, 130.

² Edwards, App. D, p. iv; approved by Lord Ellenborough C.J. in *Blackburne v. Thompson* (1812) 15 East 81, 90. For an instance of the Court inquiring of the Foreign Office of the status of foreign territory, see *The Bolletta* (1809) Edwards 171.

³ 2 Camp. at p. 611.

⁴ 15 East 81, 90. The Crown can also conclusively determine whether a particular piece of territory is hostile or not, for instance, places formerly but no longer in the possession of the enemy.

it would be unsafe for Courts of Justice to take upon them without that authority to decide upon those relations. [Lord Ellenborough added:] But when the Crown has decided upon the relation of peace or war in which another country stands to this, there is an end of the question; and in the absence of any express promulgation of the will of the Sovereign in that respect, it may be collected from other acts of the State.'

In 1813, in *The Eliza Ann*,¹ Lord Stowell said:

'After this a declaration of war was issued by the Government of Sweden; but it is said that the two countries were not in reality in a state of war, because the declaration was *unilateral* only. I am, however, perfectly clear that it was not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not, as has been represented, a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only.'

In 1814, in *R. v. De Berenger*,² when it was objected upon an indictment that it alleged a war to be in existence, which fact was not proved at the trial, Lord Ellenborough C.J. said that 'there were so many statutes which spoke of a war with France, that it was impossible for the Judges not to take judicial notice of it'.

From the speeches in the House of Lords in *Janson v. Driefontein Consolidated Mines*³ two points relevant to our present purpose emerge. First, the Earl of Halsbury L.C. said:

'The earlier writers on international law used to contend that some public declaration of war was essential, and Valin, writing in 1770, does not hesitate to describe Admiral Boscawen's operations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but though it cannot be said that that view is now the existing international understanding,⁴ it is essential that the

¹ 1 Dods. 244, 246; 2 English Prize Cases, 162, 164. See also *The Teutonia* (1872) L.R. 4 P.C. 171, a charterparty case arising out of the Franco-Prussian War, where Mellish L.J., delivering the opinion of the Privy Council, said (at p. 179): 'And though it is true... that a War may exist *de facto* without a declaration of War, yet it appears to their Lordships that this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged.'

² 3 M. & S. 67, 69.

³ [1902] A.C. 484, 493.

⁴ The correctness of the Lord Chancellor's opinion was illustrated two years later when Japan began hostilities against Russia without prior declaration of war, and the general conclusion was, I think, that she was legally justified in doing so: Pearce Higgins, *War and the Private Citizen*, p. 22. The controversy is discussed in Pitt Cobbett, *loc. cit.*

hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions.'

(He then cited Vattel, *Droit des Gens*, liv. 3, c. 5, § 70.)

The question at issue being the right to recover, upon a policy of insurance subscribed by British underwriters, the value of gold seized by the Transvaal Government before and in immediate contemplation of war, Lord Macnaghten said:¹

'The law recognises a state of peace and a state of war, but... it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war.'

Consequently, the plaintiffs' loss in the present case was recoverable on the policy, whereas had it occurred after the outbreak of war it could not have been recovered. Lord Macnaghten continued:²

'It is not, I think, for private individuals to pronounce upon the foreign relations of their Sovereign or their country and to measure their own responsibilities arising out of civil contracts with foreigners by a standard of public policy which they set up for themselves... However critical may be the state of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects.'

Moreover, it is for the Executive to determine the precise moment of the commencement of war, and in this case the Secretary of State for the Colonies (Mr Joseph Chamberlain) signed a certificate to the effect that war broke out at 5 P.M. on October 12, 1899.³

*End of war.*⁴ Similarly, it is important to know definitely when a state of war comes to an end, so that normal commercial and other intercourse with the late enemy may be resumed. An armistice does, of course, not produce this result, and during the period of the armistice which concluded hostilities between the Allies and Germany in 1918

¹ At p. 497.

² At p. 497. Note also Lord Davey at p. 500.

³ [1901] 2 K.B. at p. 427.

⁴ A certificate given on behalf of the Crown, dated April 2, 1946, to the effect that war with Germany still continued, though hostilities had ceased, is binding on British Courts: *Rex v. Bottrill, ex parte Keuchenmeister* [1947] 1 K.B. 41. On the present status of Germany, see below, p. 354.

a Norwegian ship and her contraband cargo captured on a voyage to a German port were condemned as prize.¹ Nor does the signature of a treaty of peace have that effect so long as the treaty remains unratified.² But in a number of cases wars have come to an end by mere cessation of hostilities and the belligerents have drifted into a state of peace. In such a case a British Court would look to the Crown for guidance on the question of the moment at which the state of war ceased, and there is little doubt that such guidance would be forthcoming. Towards the close of the War of 1914 to 1918 Parliament, by the Termination of the Present War (Definition) Act, 1918, conferred upon the Crown in Council power to declare the date of the termination of the war as regards any provision in any Act of Parliament, Order in Council, or Proclamation, or in any contract, deed or other instrument referring to the existing war or hostilities; such date was to be as nearly as might be the date of the exchange or deposit of ratifications of the treaty or treaties of peace, and might differ in the cases of the different enemy States.³ As the result of the non-ratification of the Treaty of Sèvres with Turkey, the precise state of our relations with Turkey remained in doubt for several years, until peace was definitely concluded by the ratification of the Treaty of Lausanne in 1924; but, so far as we are aware, it was never judicially considered in this country.

2. WHEN GREAT BRITAIN IS A THIRD PARTY FACED WITH A CONFLICT BETWEEN TWO OTHER STATES

Here we should expect the rule to be the same, for it is a matter upon which the organs of a government should speak with a single voice. It would be embarrassing if the Executive held one view and the Courts propounded another. The amount of authority is not so plentiful as in the case where Great Britain is a party to the conflict.

In *Thelluson v. Cosling*⁴ the question arising on a policy of insurance was whether or not war had been declared by Spain against France on

¹ *The Rannveig* [1920] P. 177; [1922] 1 A.C. 97; and *Annual Digest*, 1919-1922, Case No. 306 (a German decision) and Case No. 308, *United States v. Hicks*; and *Annual Digest*, 1933-1934, p. 508; and *Spitz v. Secretary of State of Canada*, *Annual Digest*, 1938-1940, Case No. 210.

² *Kotzias v. Tyser* [1920] 2 K.B. 69; *Lloyd v. Bowring* (1920) 36 T.L.R. 397, and see Beckett, 'The Right to Trade and the Right to Sue', 39 L.Q.R. (1923), pp. 89-97, and *Annual Digest*, 1919-1922, Case No. 309 (a Brazilian decision). Many foreign decisions upon armistices will be found in the *Annual Digests*.

³ Upon the effect of leases made 'for the duration of the war' or in similar terms, see the Validation of War-time Leases Act, 1944, the Tenancy Agreements (End of the War in Europe) Order, 1945, and *Hawtre v. Beaufront Ltd.* [1946] K.B. 280.

⁴ (1803) 4 Esp. 266, discussed in *Kawasaki etc. v. Bantham Steamship Co.* [1939]

a particular date. A document (presumably a copy) consisting of a declaration of war by Spain had been transmitted by the British Ambassador in Madrid to the British Foreign Office and was produced in court from the custody of the Foreign Office. Lord Ellenborough C.J. admitted it as evidence, not only as the only evidence but as proper evidence upon the particular matter of fact as to the date when war was declared. As MacKinnon L.J. remarked, in discussing this case later:¹ 'it was a Spanish document and would have been just as good evidence if it had been produced by the Spanish Ambassador'.

In *United States of America v. Pelly*² Bigham J. had to decide, in an action for damages for breach of contract to sell two colliers, whether for the purposes of a clause in the contract and of the Foreign Enlistment Act, 1870, the United States of America were 'at war' with Spain on April 23, 1898. On April 22 an American warship had captured a Spanish merchant-ship. On the same day the American President declared a general blockade of the coast of Cuba, and on April 26 the American Congress passed a resolution to the effect 'that war be and the same is hereby declared to exist, and that war has existed since April 21, 1898...between the United States of America and Spain'. Upon these facts the learned judge gave an affirmative answer to the question stated above. He also referred to the British Proclamation of Neutrality dated April 23 and published in the *London Gazette*, and is reported to have described it as 'not evidence' but 'not without weight in his mind'. Having regard to the more recent attitude of the Courts to pronouncements of the Executive upon international affairs,³ there is little doubt that to-day the Proclamation of Neutrality would be treated as conclusive.

Sir Wilfrid Greene M.R. in *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantam Steamship Co.*⁴ expressed a clear, though *obiter*, opinion that if the Court of Appeal had been concerned

'with the question whether His Majesty's Government recognizes a state of war as existing between China and Japan...the Court would be bound to take judicial notice of the fact of such recognition, and if the Court were unable to answer that question they would ascertain from the appropriate department of Government whether or not His Majesty's Government had recognized the existence of that state of war.'

He later pointed out⁵ that 'the recent events in the world have introduced new methods and a new technique', and this fact has blurred even

¹ [1939] 2 K.B. at p. 550.

² (1899) 15 T.L.R. 166.

³ See above, pp. 1-5.

⁴ [1939] 2 K.B. 544, 554.

⁵ At p. 556; see also the same plaintiffs v. *Belships Co. Ltd.* (1939) 55 T.L.R. 520.

further the line between peace and war. In that case even the fact that diplomatic relations between the two belligerents had not been severed did not, in the opinion of the Court of Appeal, preclude a finding of a state of war.

The *Kawasaki* case is of value on another point. It shews that when the Court has to construe such words as 'war' or 'hostilities' occurring in charterparties, policies of insurance and similar documents, it is concerned not to apply the technical definition of war, whether international or municipal, but to give the word the ordinary common sense meaning which the contracting parties intended to assign to it.

When Great Britain recognizes the existence of a state of war between two other States, it is necessary for her to define her own position by deciding whether to become a co-belligerent with one of the parties or to remain neutral.¹ It is not uncommon for a State to announce its attitude to the world by means of a proclamation or declaration of neutrality.

Neutrality is defined by Oppenheim² as 'the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial States and the belligerents'. Rights and duties *between States*. It is thus a matter of public international law. It is, strictly speaking, incorrect to speak of a person being neutral, though loosely the term may be used to denote the subject of a neutral State. Hague Convention XIII is entitled a 'Convention relating to the Rights and Duties of Neutral Powers in Maritime War'. Hague Convention V is, not so correctly, entitled a 'Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land'. It is often convenient to speak of a 'neutral' merchant or shipowner, but the expression is truly elliptical.

The law of neutrality is a law between States, not between belligerent States and the nationals of neutral States, and therefore we have little concern with it in this volume. There are, however, two matters which require mention.

(i) To enable the Government of a neutral State to fulfil its obligations towards a belligerent State it is necessary for the former to control

¹ I need hardly say that the terms 'non-belligerent' and 'pre-belligerent' which have become fashionable recently to describe the neutral State which is waiting for a favourable moment to jump into the contest are political and have no legal meaning. When war exists between A and B, all other States are either belligerent or neutral.

² ii, § 293.

and sometimes to prohibit certain of the activities of its nationals. Probably the most important of these activities, so far as British nationals are concerned, are those dealt with by the Foreign Enlistment Act, 1870, which renders criminal certain acts, the most important of which may be summarized as follows:

(a) for British subjects—enlistment in the military or naval service of any foreign State at war with any foreign State at peace with His Majesty;

(b) for British subjects—quitting His Majesty's dominions for the purpose stated above;

(c) for any person within His Majesty's dominions—building, equipping or despatching any ship with intent or knowledge that it will be employed in the military or naval service of any foreign State at war with any friendly State;

(d) for any person within His Majesty's dominions—preparing or fitting out any naval or military expedition to proceed against the dominions of any friendly State.¹

(ii) The second matter requiring mention is the rights and duties of British nationals, when Great Britain is a neutral State, in regard to breach of blockade,² carriage of contraband, and similar activities. International law does not require a neutral State to prohibit these activities to its nationals or others within its territory, but it permits it to do so provided that the prohibition applies to shipments to all the belligerents alike.³ British law allows them to engage upon these activities at their own peril. Internationally, the British Government will not protect them against the penalties which international law permits a belligerent to inflict upon the owners of property so engaged. Municipally, British law does not normally prohibit them, though if their activities seemed likely to cause grave embarrassment to the British Government Parliament might be asked to pass prohibitive legislation.⁴ Thus, when it is said that the carriage of contraband and blockade-running and similar unneutral services are 'illegal', it is (or should be)

¹ Not all of these prohibitions are required by international law. The connexion between this Act and the famous *Alabama* controversy which lasted from 1862 to 1871 is obvious. Wheeler, *British and American Foreign Enlistment Acts* (1896), collects a mass of information upon the Act of 1870 and its predecessors and American prototypes. On the whole question, see Oppenheim, ii, Part III, Neutrality.

² Upon the meaning of 'blockade' occurring in a charterparty, see *Spanish Government v. North of England Steamship Co.* (1938) 54 T.L.R. 852.

³ Oppenheim, ii, § 350.

⁴ For instance, in the case of a civil war, the Merchant Shipping (Carriage of Munitions to Spain) Act, 1936.

meant that they expose the property involved in them to the penalties which international law permits a belligerent to inflict and in the lawful infliction of which it compels the neutral Government representing the owners to acquiesce. It does not mean—so far as British law is concerned—that they are criminal or even illegal.

Exposition of these principles will be found in judgments by Story J. (a great authority) in *The Santissima Trinidad*¹ (contraband), by Parsons C.J. in *Richardson v. Maine Fire and Marine Insurance Company*² (contraband), by Lord Westbury L.C. in *Ex parte Chavasse, in re Grazebrook*³ (where a partnership for blockade-running was declared to be not illegal), and by Kent J. in *Seton, Maitland & Co. v. Low*⁴ (contraband), and, above all, in an admirable judgment by Dr Lushington in *The Helen*⁵ (a wages suit in respect of a voyage designed to run the blockade of the Confederate ports in 1864).

'The fact is' (said Dr Lushington at p. 4), 'the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction', and again (at p. 7): 'It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that to carry on trade with a blockaded port is or ought to be a municipal offence by the law of nations.' It is a case of a collision of rights. As it was put by Parsons C.J. in *Richardson v. Maine Fire and Marine Insurance Co.*: 'It is one of the cases where two conflicting rights exist, which either party [the neutral merchant or shipowner and the belligerent State affected] may exercise without charging the other with doing wrong.' Or in the words of Lord Westbury L.C. in *Ex parte Chavasse*: 'Their conflicting rights are co-existent, and the right of the one party does not render the act of the other party wrongful or illegal.'

Modern decisions have not disturbed these principles and they may be regarded as well settled. It will be convenient to leave to later chapters the discussion of cases illustrating the bearing of the transportation of contraband⁶ and the running of blockades upon the contract of affreightment,⁷ and upon seamen's contracts the character of which is changed by the outbreak of war.⁸

¹ (1822) 7 Wheaton's Rep. 283.

² 6 Massachusetts Rep. 102.

³ (1865) 34 L.J. (N.S.) Bank. 17.

⁴ 1 Johnson (New York) Cases 1.

⁵ (1865) 1 L.R. Adm. and Ecc. Cas. 1. But references in some of these cases to the fitting out of armed ships for a belligerent must be read by British readers subject to the Foreign Enlistment Act, 1870.

⁶ *Austin Friars S.S. Co. v. Strack* [1905] 2 K.B. 315, 321.

⁷ Chapter 8. As to the effect upon policies of insurance, see chapter 13, and Arnould, *Marine Insurance*, §§ 760 *et seq.*

⁸ Chapter 12.

3. WHEN THERE IS CIVIL WAR OR INSURRECTION IN A FOREIGN COUNTRY¹

It often becomes necessary for the private citizen, particularly the shipowner or merchant, to know how he ought to regard 'disturbances' (to use an equivocal term), or 'troubles' as they are called across the St George's Channel, when occurring in a foreign country. Do they amount to proper civil war, and, if so, has the British Government granted to the rebels 'recognition of belligerency'? Or do they come to something less than that, and has the British Government merely recognized a 'state of insurgency'? And, when they are taking place at sea, are the operations of the rebels piratical?

It would be out of place here to examine the conditions under which recognition of belligerency or of a state of insurgency can lawfully be granted, and the legal effect of the recognition of either.² Suffice it to say that recognition of *belligerency* brings into operation as between this country and each of the belligerents the law of neutrality and all the rights and duties arising therefrom, and that the subjects of this country are affected in the same way as if there were in progress a regular war in which Great Britain was neutral. Some indication of these effects in outline has been given in the previous section. On the other hand, recognition of a state of *insurgency* does not bring the law of neutrality into operation, and indeed it is doubtful whether—as between Great Britain and the insurgents—it does more than indicate that, so long as they confine their acts of violence to the parent Government against which they have risen, they will not be treated as pirates. When the British Government has granted recognition of belligerency or of a state of insurgency, then a British court will be bound to take notice of that state of affairs. If in doubt, it will consult the Foreign Office.

In *Eastern Carrying Insurance Co. v. National Benefit Life and Property Insurance Co.*³ it was held that the fact that a British expeditionary force was fighting against Bolshevik troops in Russia in July, 1918, during the civil war prevailing in Russia did not mean that Great Britain was at war with Russia, so as to make a Russian insurance company, registered and carrying on business in Petrograd, an alien enemy; the British Government had not recognized the Bolshevik Government.

¹ Upon the recent civil war in Spain, see McNair in 53 *L.Q.R.* (1937), pp. 471-500, other articles referred to in Oppenheim, ii, § 76, and numerous decisions reported in the *Annual Digest* from 1936 onwards.

² See Lauterpacht, *Recognition in International Law*, Part III. For piracy, see Oppenheim, i, §§ 272-280. Upon the meaning of 'blockade', occurring in a charterparty, in relation to a civil war, see *Spanish Government v. North of England Steamship Co.* (1938) 54 *T.L.R.* 852.

CHAPTER 2

BRITISH NATIONALITY AND ALIEN STATUS¹

It may make it easier to present the effect of war upon nationality if we begin by summarizing, in the barest outline, the British law of nationality, so far at any rate as concerns the United Kingdom.²

War and the atmosphere of war tend to bring into sharp relief questions of nationality—its rights and obligations—which, particularly in an island country, do not excite much interest in times of peace. The British policy in the past has been, as we shall see, to make it easy for the alien to become one of ourselves, and, even when he has not chosen to take that step, there have been until recent years so few disabilities attaching to the alien who had no desire to take part in public life as to make him almost indistinguishable from the native citizen. But when the clouds were gathering for the War of 1914 to 1918 both Germany and the British Empire were found to be overhauling their nationality laws, and since 1914 there has been a definite tendency both to make it more difficult than formerly to become a naturalized British subject and also to stiffen the difference in the status of the British subject and the alien. In Germany the growing interest in nationality found expression in the Delbrück Law³ of July 22, 1913, and in Great Britain in the British Nationality and Status of Aliens Act, 1914,⁴ which, though not a war measure, received the Royal Assent on August 7, 1914, and has been amended in 1918, 1922, 1933 and 1943.

It is well at the outset to understand clearly what the expressions 'nationality' and 'domicil' mean. *Nationality* can best be explained from the point of view of English municipal law by saying in Dicey's words⁵ that 'British subject' means 'any natural person who owes permanent allegiance to the Crown' (as distinct from the temporary and local

¹ Based on an article in 35 *L.Q.R.* (1919), pp. 213-232.

² The latest book is Mervyn Jones, *British Nationality Law and Practice* (1947). Flournoy and Hudson, *Nationality Laws*, published by the Oxford University Press in 1929, is a valuable collection of texts. See also Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), and Dicey, *Conflict of Laws*, Rules 20-50. For an older book, see Piggott, *Nationality including Naturalization*, etc. 2 vols. (1907).

³ Printed as a Parliamentary Paper, together with a Memorandum by H.B.M. Embassy at Berlin, Cd. 7277 of 1915. Much of it has been repealed.

⁴ It is convenient to refer to the Act, as amended, as 'the consolidated Act', and the references are to that Act except where otherwise stated.

⁵ *Conflict of Laws*, Rule 20.

allegiance owed by an alien while, and because, he is within the British dominions); and that 'alien' means 'any person who is not a British subject'. We shall see later, however, that a person may be a British subject by English law, and a subject of some other country by some foreign law. Dicey tells us that¹

'The *domicil* of any person is the country which is considered by English law to be his permanent home. This is (1) in general, the country which is in fact his permanent home; (2) in some cases the country which, whether it be in fact his home or not, is determined to be so by a rule of English law.'

We shall also find that mere *residence*—in the barest sense of the word and denoting little more than presence in a particular spot—has important consequences in determining a person's status, and so we must add it to nationality and domicile as relevant tests of British, allied, neutral, or enemy character during war.

We shall now consider

- who are British subjects, and how British nationality may be acquired and lost;
- dual nationality;
- the position of married women and minor children;
- the German law of nationality;
- alien status;
- statelessness;
- the effect of outbreak of war upon aliens;
- the position of alien enemies.

BRITISH NATIONALITY

Who then have British nationality? Who is a British subject?

The leading common law authority is *Calvin's case*²—a perfect mine of curious learning, a medley of the civil and common laws and of biblical quotations and secular history—where the court was asked to pronounce upon the status of the *Postnati*, i.e. persons born in Scotland after the accession of James I to the throne of England, but went further and took the opportunity of a lengthy examination of the law of nationality. There are two courses open to us. We might trace the development of the idea of British nationality and the processes of Denization and Naturalization in the law reports and on the statute roll. On the other hand, we might, and shall, go straight to the British Nationality and Status of Aliens Act, 1914 (which is both an amending

¹ Rule 1.

² (1608) 7 Rep. 1. See Cockburn, *Nationality* (1869).

and a consolidating statute), as amended by a nation smarting under four bitter years' experience of war in 1918, and again in 1922, 1933 and 1943.

Section 27 (1) of the Act of 1914 provides that 'the expression "British subject" means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of His Majesty by reason of any annexation of territory'.¹ Let us examine these three classes.

(1) *Natural-born British subjects.* The Act of 1914² boldly attempts what no previous Act and few judges have ever attempted, namely to give a comprehensive definition of this class. This is contained in section 1, which now, after much amendment, reads as follows:

1. (1) The following persons shall be deemed to be natural-born British subjects, namely:

(a) Any person born within His Majesty's dominions³ and allegiance; and

(b) Any person born out of His Majesty's dominions whose father⁴ was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions,⁵ that is to say, if either—

(i) his father was born within His Majesty's allegiance; or

(ii) his father was a person to whom a certificate of naturalization had been granted; or

(iii) his father had become a British subject by reason of any annexation of territory; or

(iv) his father was at the time of that person's birth in the service of the Crown; and

(c) Any person born on board a British ship whether in foreign territorial waters or not.

(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

(3) Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this Act.

¹ This definition is not exhaustive as we shall see; e.g. it does not mention the alien woman who marries a British subject, or the wife of an alien to whom a certificate of naturalization is granted (as to whom, in the case of a certificate granted after the end of 1933, see section 10 (6) of the consolidated Act). Section 27 (2) provides that children included in a certificate shall be deemed to be persons to whom the certificate is granted.

² As to the effect of the legislation of Eire upon the status of British subject by birth conferred by this Act, see *Murray v. Parkes* [1942] 2 K.B. 123.

³ Not to be confused with the Self-governing Dominions which form a part only of the King's dominions. The expression 'His Majesty's dominions' does not include—at any rate for purposes of nationality—protectorates and mandated territories.

⁴ A word which implies birth in wedlock.

⁵ A fifth alternative condition was deleted by the amending Act of 1943, and replaced by provisions quoted in the text.

(4) The certificate of a Secretary of State that a person was at any date in the service of the Crown shall, for the purposes of this section, be conclusive.

The British Nationality and Status of Aliens Act, 1943, is an Act designed (*inter alia*) 'to amend the law relating to the nationality of children born abroad of British fathers; to make special provision for the naturalization of persons rendering service in connection with the present war; (and) to restrict the making of declarations of alienage in time of war.' It repeals sub-paragraph (v) of paragraph (b) of subsection (1) of section one of the consolidated Act, and enacts certain new provisions, of which we shall quote the following:

'Section 1. (2) A person born outside His Majesty's dominions whose father was at the time of the birth a British subject shall be deemed to be and always to have been a natural-born British subject—

(a) in the case of a person born after or within one year before the commencement of this Act, if his birth is registered at a consulate¹ of His Majesty within one year after its occurrence;

(b) in the case of any person, whether born before or after the commencement of this Act, if his birth is at any time registered at such a consulate with the permission of the Secretary of State or the Secretary of State directs that although registered without his permission it shall be deemed to have been registered with his permission.

Section 2. (1) Any person born, whether before or after the commencement of this Act, in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty was at the time of that person's birth exercising jurisdiction over British subjects, shall, if at the time of his birth his father was a British subject, be deemed to be and, in the case of a person born before the commencement of this Act, always to have been, a natural-born British subject.

(2) For the purposes of sub-paragraph (i) of paragraph (b) of subsection (1) of section one of the principal Act, any such person as aforesaid shall be deemed to have been born within His Majesty's allegiance.

Section 3. Any person born after the death of his father, whether before or after the commencement of this Act, shall, if his father died a British subject, be deemed to be and, in the case of a person born before the commencement of this Act, always to have been, a natural-born British subject in any case in which he would have been a natural-born British subject if his father had survived and remained a British subject until after the birth.'

¹ Note s. 6 of the Act of 1943 as to the need in certain cases of a declaration of retention of British nationality by persons whose birth was registered at a British consulate.

It will be noted (section 1 (1) (a) of the consolidated Act) that 'any person born within His Majesty's dominions and allegiance' is a natural-born British subject, even if his parents are aliens. The words 'and allegiance' are designed to exclude from the scope of the definition two previously recognized exceptions from the rule:

(i) 'Any person whose father (being an alien) is at the time of such person's birth a foreign sovereign or an ambassador or other diplomatic agent accredited to the British Government by the Government of a foreign State is (though born within the British dominions) an alien' (Dicey's Exception 1 to Rule 22).

(ii) 'Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien'¹ (Dicey's Exception 2 to Rule 22).

Dicey suggests a third Exception to his Rule 22, namely, that the children born in the British dominions of a father who is at the time of their birth a prisoner of war, or interned as a matter of precaution, in British or allied territory is an alien. He describes this view as 'speculative and a deduction from the principle enunciated in Exception 2'. This remark seems to suggest that the reason underlying both Exceptions (2 and 3) is a temporary suspension of the local allegiance owed to the Crown by aliens on British territory. Dicey's Exception 3 requires some explanation.² In the next chapter we shall submit the opinion that both interned enemy civilians (at any rate when not interned by reason of action hostile to this country) and prisoners of war *stricto sensu* are within the King's protection and enjoy, apart from the right to sue out a writ of *habeas corpus*, full procedural status and as much personal and proprietary status as the enemy who is at large. Let us consider each category. (a) The enemy civilian by coming to this country voluntarily placed himself within the King's protection and voluntarily undertook local allegiance to him. Why should internment destroy his local allegiance to the Crown? If during internment he conspired against the Crown, say, by corrupting his guards, or aided the Crown's enemies by shewing lights to guide enemy aircraft, would he not be guilty of treason?³ It is suggested that the children born on British territory of a father who is an interned enemy civilian are natural-born British subjects. We are inclined to add that for this purpose it makes no difference whether the internment was a matter of precaution or resulted from hostile action. (b) The case of the

¹ As to birth on territory under belligerent occupation, see later, chapter 17.

² See an article in *Law Times*, February 8, 1941, p. 67.

³ It is worth noting that 'treachery' under the Treachery Act, 1940, does not depend upon allegiance.

children of the prisoner of war *stricto sensu* is not so clear. He is certainly within the King's protection for procedural purposes. We are told in *Calvin's case*¹ that 'if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason; for the indictment cannot conclude *contra ligeant' suae debitum*, for he never was in the protection of the King, nor ever owed any manner of ligeance unto him...'. But our question is whether an enemy member of enemy forces taken in action against this country (whether within this country or outside it) and imprisoned in this country can be said to owe local allegiance to the Crown *from the moment of his imprisonment*. If taken within this country, he was sent here by order of his Government; if taken without this country, he was brought here against his will, unless it can be said that one who surrenders or is surrendered by his superior officers is thereby deemed to enter this country voluntarily and undertake local allegiance to the Crown. It is true that in *Sparenburgh v. Bannatyne*² Heath J. said of a prisoner of war:³ 'If he conspires against the life of the King, it is high treason'; but this was not essential to the judgment of the Court, which rested on the King's protection, and moreover the prisoner of war in question was not an enemy subject but a neutral subject, of whom Eyre C.J. said:⁴ 'But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy; he can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us. When the allegiance determines, the character determines.' We incline to the view that the children born in this country of a father who is a prisoner of war *stricto sensu* are not natural-born British subjects.

(c) Subsection (1) (b) involved a change taking effect in 1915, and was further amended in 1918 and 1922. Previously a child born out of the British dominions, whose father or paternal grandfather was born in the British dominions, and whose father at the time of the birth had not ceased to be a British subject (otherwise than by death), was himself a natural-born British subject. Now, however, the paternal grandfather has disappeared, and the father may be either natural-born or naturalized.⁵

(2) *Naturalized British subjects*, either by private Act of Parliament, or (which is the normal mode) by the certificate of a Secretary of State or the appropriate authority in a British possession under a general statute such as the Naturalization Act, 1870, or the Act of 1914 which

¹ (1608) 7 Co. Rep. 1a, 6b.

² (1797) 1 Bos. & P. 163.

³ At p. 171.

⁴ At p. 168.

⁵ See section 1 (1) (b) of the consolidated Act for the other conditions which must be satisfied.

repeals it,¹ or by the marriage of an alien woman to a British subject, if the latter process may be called 'naturalization' without doing violence to the meaning of that term. The requirements of the consolidated Act (section 2) may be summarized as follows:²

(a) Residence³ in the King's dominions for not less than five years, of which one year must be immediately before the application and the other four within the period of eight preceding the application, or service of the Crown for not less than five years within the same period;

(b) Good character, and adequate knowledge of the English language or (in a British possession) of some other language (if any) which is recognized as on an equality with it;⁴

(c) Intention to continue such residence or to enter or continue in such service;

(d) The taking of the oath of allegiance when the certificate of naturalization has been granted.

It should be noted that under the Act of 1914 the grant or refusal of a certificate of naturalization is in the absolute discretion of the Secretary of State (in practice the Home Secretary in the United Kingdom) who may withhold it without assigning any reason and without any appeal from his decision. Until 1918 there was no provision by statute or common law to prevent the naturalization of alien enemies during war, and in the early months of the War of 1914 to 1918 a number of them were naturalized. But section 3 of the amending British Nationality and Status of Aliens Act, 1918, provided that no person who on August 8, 1918, was an enemy subject could obtain a certificate of naturalization 'before the expiration of a period of ten years after the termination of the present war', unless he served in the British, allied, or associated forces or was 'a member of a race or community known to be opposed to the enemy governments', e.g. a Pole or an Armenian, or 'was at birth a British subject'. And in the case of a person naturalized during the same war 'who at, or at any time before, the grant of the certificate was a subject of a country which at the date of the grant was at war with His Majesty', the Home Secretary was obliged by the same section to refer the question of the

¹ Including the naturalization of minors in certain circumstances by reason of parental naturalization: see Naturalization Act, 1870, section 10 (5) (as amended by the Naturalization Act, 1895) and sections 5 (1) and 27 (2) of the consolidated Act.

² As to French nationals during the recent war, see s. 4 of the Act of 1943.

³ These residence qualifications are not required in the case of widows and divorcees (section 2 (5)), infants (section 5 (2)), and British-born wives of alien enemies (section 10 (6)).

⁴ See section 8 (1).

desirability of revoking the certificate to the Committee constituted by the Act. During the War of 1939 to 1945 there were many persons of enemy nationality living in this country who were technically known as 'victims of Nazi oppression', and a number of them received certificates of naturalization during the war.¹

Revocation of naturalization. It has been remarked by some observers that during the last few decades before the War of 1914 to 1918 national feeling in England was becoming intensified, and the traditional welcome extended to foreigners who for one reason or another, not necessarily political, did not wish to remain in their native countries, was being abandoned. The Aliens Act, 1905, may be mentioned, and the gradually increasing precariousness of British nationality acquired by naturalization points to the same conclusion. The Naturalization Act, 1870, contained no provision for the revocation of a certificate of naturalization, and was content to assume that the Home Secretary would only grant certificates after adequate consideration. By the Act of 1914, section 7, the Secretary of State may revoke a certificate which appears to him to have been obtained by 'false representation or fraud', and by the Act of 1918, which substituted two new sections 7 and 7a for section 7 of the Act of 1914, the following alternative grounds may cause naturalization to be revoked:

- (1) Obtaining his certificate by 'false representation or fraud'; or
- (2) 'By concealment of material circumstances';
- (3) Disaffection or disloyalty 'to His Majesty' by act or speech (whether or not this includes the *bona fide* expression of republican opinions which is permitted to the natural-born British subject, is not clear);
- (4) Unlawful trading or communication with the enemy during war, or association with a business which to his knowledge assists the enemy during war;
- (5) Sentence by a British court within five years of grant of certificate to imprisonment for twelve months or more, penal servitude, or a fine of £100 or more;
- (6) Lack of good character at the date of grant of the certificate;

¹ This practice was suspended; and the following Press Notice was issued on November 11, 1940:

'It is announced by the Home Office that the consideration of applications for naturalization has been suspended until further notice subject to the following exceptions:

- (1) applications from women who lost their British nationality on marriage and whose marriages have been terminated;
- (2) applications from British-born women who are married to aliens of enemy nationality; and
- (3) exceptional cases where naturalization is a matter of direct national interest.'

(7) Seven years' ordinary residence outside His Majesty's dominions otherwise than as the representative of a British subject, firm, company, or institution, or as a servant of the Crown, coupled with failure to maintain 'substantial connection with His Majesty's dominions'; or

(8) The fact of remaining 'according to the law of a State at war with His Majesty a subject of that State'.

In cases (1) to (3) inclusive, the Home Secretary when 'satisfied' that a case has arisen, 'shall...revoke the certificate'. In the remaining cases he must also be satisfied that 'the continuance of the certificate is not conducive to the public good'. In any case he may order an inquiry by the committee constituted by the Act, and in cases (1) to (4) inclusive, (6) and (8) he 'shall' give the naturalized British subject an opportunity of claiming an inquiry.

We are not concerned here with the policy of these provisions, but it is clear that if an alien contemplating an exchange of nationality knows that he is liable at some future time to have his naturalization revoked and to find himself suspended in international mid-air, because at the time of his naturalization his character was not 'good' in the opinion of a committee of whose composition and moral standards he is ignorant, or because within five years of his naturalization he is sentenced (perhaps for an offence involving no great moral turpitude) to a fine of £100, he will not regard British acquired nationality as the premier security that it was in the Victorian age; which is probably the result the framers of the Act of 1918 desired to achieve.¹

The effect of the revocation of a certificate of naturalization is stated by the Act of 1914, as amended in 1918, to be that 'the former holder shall be regarded as an alien and as a subject of the state to which he belonged at the time the certificate was granted'.² In many cases, however, he may have previously divested himself of his nationality of origin before applying for naturalization, in which event the effect of revocation presumably is to leave him an alien of no nationality³—'neither fish, nor flesh nor good red herring'—though English law will continue to regard him as having recovered his last foreign nationality (if any).

Once granted, however, and while unrevoked, the certificate 'subject to the provisions of this Act' entitles him to 'all political and other rights, powers and privileges', and imposes upon him 'all obligations,

¹ It is interesting to compare the corresponding provisions of the law of the United States of America in section 338 of the Nationality Act, 1940.

² S. 7 A (3).

³ This may also occur under other systems, e.g. in the United States of America and in Germany.

duties, and liabilities, to which a natural-born British subject is entitled or subject'; he acquires 'to all intents and purposes the status of a natural-born British subject',¹ so that he may say *civis Romanus sum*, and, if he is a Protestant, may even aspire to becoming Lord Chancellor. The sanctity of the status of British subject, backed up by the prestige of the British Empire, is well illustrated by reference to the case of *Don Pacifico*,² a Jew born at Gibraltar and so a natural-born British subject, who subsequently resided at Athens and by suffering injury at the hands of a mob in 1847 was the occasion of measures being taken by the British Government in 1850 for the sequestration of Greek ships in Greek ports.

*Imperial naturalization.*³ One of the objects of the Act of 1914 (ss. 8 and 9 in particular) was to place the type of British nationality acquired by naturalization upon a uniform basis throughout the Empire; but it will be seen from section 9 that the Self-governing Dominions are free to adopt the relevant part of the Act or not as they choose. Until they have all adopted it,⁴ and until local naturalization certificates previously granted have been converted by application into post-adoption certificates, there will continue to be several types of acquired nationality throughout the Empire, and a person may be an alien enemy in one part of the Empire and a British subject in another. Thus British nationality acquired by naturalization may be either (a) complete in point of space, that is, imperial in character, or (b) limited in point of space, that is, local in character. So in *Markwald's case*,⁵ the applicant, a German-born subject, had been convicted before a police magistrate for that he, 'being an alien' resident in London, had failed to furnish certain particulars to the registration officer as required by the Aliens Restriction (Consolidation) Order, 1916. He had obtained in 1908 from the Commonwealth of Australia a certificate of naturalization whereby he became 'entitled to all political and other rights, powers, and privileges' and became 'subject to all obligations to which a natural born British subject is entitled or subject in the Commonwealth'. Upon his application for a rule directing a case to be stated, a Divisional Court of the King's Bench, nevertheless, held that in the United

¹ This statement is very general in its terms and does not prevent the Crown from discriminating against naturalized persons or their children in the matter of admission to any branch of the public service.

² Pitt Cobbett's *Leading Cases and Opinions on International Law* (4th ed.), i, p. 209.

³ See Van Pittius, *Nationality within the British Commonwealth of Nations* (1930), particularly chapters vi and xvii.

⁴ Section 9 (4) enables a Dominion to rescind its adoption.

⁵ [1918] 1 K.B. 617 approved by the Court of Appeal in a subsequent action for a declaration *Markwald v. Attorney General* [1921] 1 Ch. 218.

Kingdom Markwald was an alien, although he had taken the oath of allegiance in Australia, and that his allegiance in the United Kingdom was merely that owed by every stranger within our gates.

It is, however, the intention of the Act of 1914 to sweep away these anomalies and to constitute a system of uniform Imperial naturalization. This has very nearly been achieved. All the Dominions (except Eire) have now adopted the relevant Part of the Act.¹ Some doubt having existed on the question whether Eire had remained, upon attaining the status of a Dominion, bound by the provisions of the Act, that Dominion passed in 1935 the Nationality and Citizenship Act, 1935, repealing the British Nationality and Status Acts of 1914 and 1918 in so far as they had ever been in force in that country.²

Accordingly cases like that of *Markwald* are less likely to occur in the future.

(3) *British subjects by annexation of territory.* Section 27 (1) of the Act of 1914 as amended in 1918 draws attention to an important section of British subjects, namely those who become so 'by reason of any annexation of territory'. Field-marshal Smuts naturally occurs to one as a most distinguished illustration of this class.

Voluntary loss of nationality. In addition to the compulsory loss of nationality by revocation of naturalization, provision exists for voluntary loss. The common law rule *nemo potest exuere patriam* was abrogated by the Naturalization Act, 1870. The consolidated Act provides for loss of British nationality in several ways.

(i) By section 13:

A British subject, who, when in any foreign state and not under disability,³ by obtaining a certificate of naturalization or by any other

¹ The position of the new Dominions of Burma, India and Pakistan is at present unascertainable. Under section 8 of the consolidated Act, the Government of British India had the same power to grant certificates of naturalization as the Secretary of State has under the Act, and it is noteworthy that under the proviso to that section the exercise of this power by the Government of India was not subject to the approval of the Secretary of State. Although the power to grant certificates of imperial effect had thus been given to the Government of India, it is of interest to observe that local naturalization had not become a thing of the past in India and that it was the subject of new legislation as recently as 1926, in the Naturalization Act of that year. The position of India may be contrasted with that of Eire. Section 33 of the Eire Nationality and Citizenship Act, 1935, expressly provided for the repeal of the British Nationality and Status of Aliens Acts, 1914 and 1918, so far as they were in force in Eire. This involved the renunciation of the power to grant imperial certificates given by section 8 of the consolidated Act.

² The effect of the Eire Act of 1935 is controversial: see Keith in *Journal of Society of Comparative Legislation*, 3rd ser. xvii (1935), pp. 115, 116.

³ Which is defined in section 27 (1) as 'the status of being a married woman or a minor, lunatic, or idiot'.

voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.

The existence of a state of war places upon this right a limitation which is not very clearly defined.

(a) *Naturalization in enemy State.* From *Rex v. Lynch*¹ it appears that a British subject who with traitorous intentions attempts to become the naturalized subject of an enemy State does not lose his British nationality, whether or not he may succeed in obtaining enemy nationality according to the law of the enemy country; his attempt to become naturalized is ineffective, and the King's Bench Division in a trial at bar declined to admit 'that an act of treason can give any rights to any person whatever'.

On the other hand, *Fasbender v. Attorney-General*² shews that a female British subject can during war contract a marriage in good faith with an enemy subject and thereby lose her British, and acquire enemy, nationality. In the case of *In re Chamberlain's Settlement*³ it was contended upon the authority of *Rex v. Lynch* that an attempt by a British subject to become naturalized in Germany in 1916 was of no effect, but it became unnecessary to decide this question because it was held that, whether or not he thereby ceased to be a British subject, he certainly became a 'German national' according to German law and was a German national for the purposes of the Treaty of Peace and Orders in Council made under the Treaty of Peace Act, 1919, to give effect to it, so that his property in England was liable to forfeiture thereunder.

(b) *Naturalization in a non-enemy State.*⁴ We are not aware that an English Court has ever found it necessary to pronounce upon the effect of an attempt by a British subject to become naturalized in a non-enemy State in time of war. In *Johnstone v. Pedlar*⁵ the plaintiff, a natural-born British subject, had become an American citizen by naturalization in January 1916, that is, during a war in which the United States were then neutral. The validity of this naturalization was not questioned either in the House of Lords or in the two Irish Courts.⁶ It was a very material point because the defence of 'Act of State' could not have been pleaded against a British subject in respect of an act done on British territory.

¹ [1903] 1 K.B. 444, 458.

² [1922] 2 Ch. 850. See later, p. 131.

³ [1921] 2 Ch. 533.

⁴ For a claim by a British subject that he had ceased to be British because Eire had, by the Constitution of Ireland, 1937, seceded from the British Commonwealth of Nations, see *Murray v. Parkes* [1942] 2 K.B. 123.

⁵ [1921] 2 A.C. 262.

⁶ [1920] 2 Irish Reports, 450.

(ii) By section 14 (1) any person, who in addition to becoming a natural-born British subject by being born in the King's dominions, also becomes at the time of his birth, or during his minority, a subject of another State and remains so, may on attaining full age make and register¹ a declaration of alienage, and so cease to be a British subject, but until doing so he remains a British subject.

(iii) By section 14 (2) any person who, though born out of the King's dominions, is a natural-born British subject, may on attaining full age make and register¹ a similar declaration of alienage and so cease to be a British subject.²

(iv) By section 5 (1) a person whose name, when a minor child, was included in a certificate of British naturalization, may within one year after attaining his majority make a declaration of alienage and cease to be a British subject.

It will be noted, however, that under section 14, unlike section 5 (1), there is no time limit.

DUAL NATIONALITY

Our law recognizes the fact of dual (and even plural) nationality, which can arise in several ways,³ for instance (*jure soli*) by the birth on British territory of the child of a foreign father whose State adopts the *jus sanguinis* and attaches its nationality to the children of its nationals born abroad. War may introduce serious complications into the life of a dual national.

(1) Either of the States whose national he is can call upon him to perform military or other service, even against the other, though in practice we have sometimes mercifully assigned non-combatant duties to a person holding both British and enemy nationality; if such a person is taken in arms against His Majesty, his enemy nationality will not protect him on a prosecution for treason.

¹ See British Nationality, etc., Act, 1943, section 7.

² *Quaere*, unless he can shew that he was possessed of two nationalities? Contrast section 4 of the Naturalization Act, 1870, where these two sub-sections are substantially combined with the possible, though not certain, result that the second part might be read in the light of the first part which postulates the possession of two nationalities. Can a person now 'declare' himself into a condition of statelessness? Russell J. answered this question *obiter* in the affirmative: *Stoeck v. Public Trustee* [1921] 1 Ch. 67, 80.

³ Oppenheim, 1, §§ 308-310a. For the United States law which is similar though not identical, see Hyde, 1, § 372. The statement in the judgment of the Chief Justice of the Court of Appeals of the District of Columbia, 'dual citizenship... [is] unknown to our institutions' is difficult to understand (*Von Zedtwitz v. Sutherland* 26 F. (2nd) 525, 527; *Annual Digest*, 1929-1930, Case No. 159).

Third States may at their option treat a dual national as a national of either of the States to which he owes allegiance. So Great Britain may treat a dual national holding both enemy and neutral nationality as an enemy and impose upon him the obligations pertaining to that status.¹

(2) A state of war places certain limitations upon the right of the person having dual nationality, British and another, to divest himself of the former. The Court of Appeal in *Freyberger's case*² construing section 14 summarized above, stated that such a person 'cannot during a state of war divest himself of his allegiance to the British Crown in order to become solely the subject of an enemy State'.³ So a man who was born in the United Kingdom (and so became a British subject by English law) of parents who were Austrian subjects (so that, as was assumed by the Court, he became and remained an Austrian subject) was held to be not entitled to make a valid declaration of alienage on attaining the age of twenty-one years. He had been compulsorily enlisted in the British Army when twenty years of age, and on reaching his twenty-first birthday purported to make a declaration of alienage and claimed his discharge. The Court of Appeal was of opinion that section 14 of the Act of 1914 must be construed subject to general principles of law, amongst which they included that illustrated by *Rex v. Lynch*⁴ to the effect that a British subject (in *Lynch's* case there was no question of dual nationality) cannot, when the British Empire is at war, become a subject of an enemy State and divest himself of his British nationality.⁵ *Freyberger's case* was followed in *Gschwind v. Huntington*,⁶ where the dual national was British and Swiss, that is, the citizen of a neutral State, and the latter is a stronger case in the respect that the dual national, though subject to the operation of the Military Service Acts, had not actually become a member of the armed forces.

In both these cases the dual national had already become subject to the operation of the Military Service Acts. But can one who is both a British subject and the subject of a non-enemy State and who is not subject to the operation of any Military Service Act become in time

¹ After the War of 1914-1918 the property of certain nationals of South American countries who were also German nationals was retained and applied under the charge created by the Treaty of Versailles and the Treaty of Peace Order.

² [1917] 2 K.B. at p. 139. Article 278 of the Treaty of Versailles of 1919 deserves note.

³ See also section 16 of the consolidated Act which also applies in time of peace.

⁴ [1903] 1 K.B. 444.

⁵ [1917] 2 K.B. at p. 132; see also *Sawyer v. Kropp* (1916) 85 L.J. K.B. 1446.

⁶ [1918] 2 K.B. 420. See also *Vecht v. Taylor* (1917) 116 L.T. 446, and *Dawson v. Meuli* (1918) 118 L.T. 357.

of war the subject of a non-enemy State and divest himself of his British nationality? Whatever may be the strict law, in practice his calling up is suspended until he attains the age of twenty-one,¹ when he may make a declaration of alienage if he wishes to do so.

A new factor consists of the Statutes and Defence Regulations under which the Crown can require its subjects, both male and female,² to serve the State in a multitude of ways, both in industry and in civil defence. Can the effect of these Statutes and Defence Regulations be likened to the effect of the Military Service Acts of the War of 1914 to 1918 as illustrated by the cases above referred to? Having regard to the recent extension of the liability of the civilian subject to take part in the defence of his country, we suggest that an English Court would be justified in denying to almost every British subject the right to divest himself of British nationality while his country is at war.

If during war it is impossible either to be naturalized in a non-enemy State or to make a declaration of alienage in favour of a non-enemy State, then sections 13 and 14 of the Act of 1914 become dead letters whenever we are engaged in war, although the war may be upon a distant frontier and may call for no change in the life of the mother country. Possibly the rule is that naturalization in, and declarations of alienage in favour of, a non-enemy State in time of war are only void and of no effect when the object is treasonable or the effect would be to escape obligations of service to the country.

Summing up the position of the dual national in time of war,

(a) if he is by nationality both British and enemy, he is, as a matter of law, liable in his former capacity to the military and other obligations of British subjects and in his latter capacity to internment;

(b) if he is both British and the subject of a non-enemy foreign State (be it neutral or allied or merely associated with us in the war), he is liable to the military and other obligations of British subjects;

(c) if he possesses the nationality of an enemy State and a non-enemy foreign State, we can treat him either as an enemy subject and intern him, or as an alien friend and apply to him the milder regulations appropriate to that condition.

Dual nationality is not half one nationality and half another, but two complete nationalities, and in time of war verily a *damnosa hereditas*.

¹ Except in the case of the nationals of certain allied countries: see Allied Powers (War Service) Act, 1942, and Orders in Council thereunder.

² E.g. the National Service (No. 2) Act, 1941, section 3.

MARRIED WOMEN AND MINOR CHILDREN

The effect of the consolidated Act upon the nationality of married women (particularly the Act of 1933 passed in order to give effect to a Convention¹ signed at The Hague on April 12, 1930) may be summarized as follows.²

The general principle is that the nationality of a married woman is the same as that of her husband, be he British or foreign (section 10 (1)). But a British woman who, before or after the commencement of the Act of 1933, marries an alien, is not deemed to have ceased to be British unless 'by reason of her marriage'³ she acquires the nationality of her husband (section 10 (2), which is retrospective). For instance, for a few years before the enactment of this provision a British woman, who married an American citizen, became stateless, losing her British nationality and not acquiring American citizenship. Similarly, where a man during the continuance of his marriage ceases, either before or after the commencement of the Act of 1933, to be a British subject, his wife does not by reason only of that fact cease to be British unless she has acquired his 'new nationality'⁴ by reason of his acquisition of it (section 10 (3)). Again, if by reason of her husband's change of nationality she also acquires that nationality, she may within certain limits of time make a declaration of her desire to retain British nationality and so retain it (section 10 (4))—which, however, cannot prevent her from being regarded by her husband's new State as a national of that State in addition. Again, a certificate of naturalization granted after the end of 1933 to an alien does not *ipso facto* make his non-British wife a British subject unless within certain limits of time she makes a declaration of her desire to acquire British nationality (section 10 (5)).

During a war, the wife of an alien enemy, if she was at birth a British subject, may declare her desire to resume British nationality,

¹ See for summary Oppenheim, i, § 299, n., and also for references to literature on the subject of the nationality of married women.

² The sections referred to are the sections of the consolidated Act. See G. G. Phillimore in *Journal of Society of Comparative Legislation*, N.S., xxxix, p. 165.

³ If this expression is construed strictly, and I see no reason why it should not be so construed, the British woman who marries an alien must be considered to retain her British nationality, unless by the law of her husband's country she automatically acquires his nationality by the fact of marriage; there are many countries under the law of which this does not happen automatically.

⁴ The use of the expression 'new nationality' probably means that the British wife of a British subject does not lose her nationality when he makes a declaration of alienage, because he does not thereby acquire a new nationality.

whereupon the Home Secretary may in his discretion grant her a certificate of naturalization (section 10 (6)).¹

By section 11 a woman retains after the death of her husband or dissolution of the marriage the nationality (if any) acquired by marriage, until it is changed by one of the recognized methods; section 2 (5) simplifies the process of naturalization for a woman formerly a British subject (by birth or otherwise) who became an alien on marriage.

The wife and minor children of a man whose certificate of naturalization is revoked remain British subjects unless (1) the Home Secretary directs that they or any of them shall cease to be British, which, in the case of a woman who was at birth a British subject, he can only do when, if she had held a certificate in her own right, it could properly have been revoked under the Act; or unless (2) the woman within six months of the revocation makes a declaration of alienage; the effect of such a direction by the Home Secretary is that the persons affected cease to be British subjects and become aliens.²

With regard to minor children, an alien upon obtaining a certificate of naturalization may be allowed by the Home Secretary to include in the certificate the names of any alien minor children already born, who thereupon become British subjects.³ Similarly, the British minor children of a person (presumably the father, if alive, or, if not, the mother) who ceases to be a British subject, themselves lose British nationality, unless by the law of the new country of adoption those minor children do not become naturalized therein.⁴ But in both these cases the child may, within twelve months of attaining his majority (presumably his majority by English law), by declaration divest himself of British nationality in the former case or re-acquire it in the latter.⁵

An unmarried woman can become a naturalized British subject in the same way as a man. There are, however, other ways in which an alien woman may acquire British nationality: (a) when she marries a British subject, she does not receive a certificate of naturalization, and no provision exists for revoking her acquired British nationality, so that she is in an impregnable position; (b) again, when an alien becomes British by naturalization and his wife thereby acquires British

¹ Thus placing certain ex-British wives of alien enemies in a better position than the ex-British wives of alien friends, who cannot be naturalized independently of their husbands. It is believed that this subsection has been widely and liberally applied.

² S. 7 A (1).

³ S. 5 (1); and note the wide power of the Secretary of State 'in any special case in which he thinks fit' to grant a certificate of naturalization to any minor (section 5 (2)). As to minor children under section 10 (5) of the Naturalization Act, 1870, see *In re Carlton* [1945] Ch. 280, 372.

⁴ S. 12 (1).

⁵ SS. 5 (1) and 12 (2).

nationality,¹ she also appears to be in an impregnable position,² for her husband cannot be denaturalized for acts on the part of the wife which, were she an unmarried woman, would call for revocation under section 7 of the consolidated Act. This view derives some support from section 27 (2) of the consolidated Act, which provides that

'Where in pursuance of this Act the name of a child is included in a certificate of naturalization granted to his parent... such child shall, for the purposes of this Act, be deemed to be a person to whom a certificate of naturalization has been granted.'

The effect is that he, like his father, is exposed to the possibility of revocation under section 7; but the wife of an alien becoming naturalized is not, and does not require to be, included in his certificate, so that the absence of any similar provision deeming her to be a person to whom a certificate of naturalization has been granted is a clear indication that she is not exposed as an independent person to the perils of revocation.

In both these cases (a) and (b), so long as their husbands remain British subjects, there is no way (apart from parliamentary intervention) in which we can be rid of their wives as British subjects. We take them, as their husbands do, 'for better, for worse'.

GERMAN LAW OF NATIONALITY

We cannot attempt to review the nationality laws of even the principal nations,³ but it is worth while saying a few words upon the German law at our main point of contact with it, namely, the national status of the German subject who has become or seeks to become a naturalized British subject. In 1913 Germany revised her imperial and state nationality law by what is termed the Delbrück Law, a translation of which, together with a Memorandum upon the law by H.B.M. Embassy at Berlin, was presented to Parliament in March 1914.⁴ This legislation, now modified but, so far as I can ascertain, not repealed, had 'the double object⁵ of rendering more difficult the loss of German nationality and

¹ Which does not happen automatically—see s. 10 (5) of the consolidated Act.

² In Dicey, p. 168, it is said, citing *Jaffé v. Keel* [1916] 2 K.B. 476, that 'the wife of a naturalized British subject... is not a naturalized British subject' and that 'she acquires British nationality by reason of her marriage to the same extent as does the wife of a natural-born British subject'. All that that case decides is that she is not a person who 'has obtained a certificate of naturalization'. Perhaps it is more convenient to confine the term 'naturalization' to the grant of a certificate of naturalization.

³ See books referred to above, p. 12.

⁴ Reprinted, Cd. 7277 of 1915.

⁵ Perhaps one object was to make retention of nationality easier by (a) abolishing unintentional loss, and (b) facilitating reacquisition.

of facilitating its recovery'. The fact that it succeeded in these objects must have been a matter for regret to some at least who thought they had ceased to be German subjects, as we shall presently see. By section 13 of this Law, one who was formerly a German national may, without settling again in Germany, become naturalized upon application to his former Federal State and upon complying with certain terms more lenient than those applicable to a pure foreigner (section 8), whatever may have been the cause of his loss of German nationality. Section 16 gave a similar though qualified right to one who was formerly a German national and had lost his nationality through non-performance of his military service. Now note the effect of these provisions upon the cases of two former Germans, Weber and Liebmann. Weber,¹ born in Germany in 1883, left that country about the age of fifteen for South America. After living there two or three years he came to England, where he had lived since 1901. He had thus *ipso facto* lost his German nationality under the North German Law of 1870 (extended in 1873 to the whole German Empire) by ten years' uninterrupted² residence abroad, and he had not acquired any other nationality; but for the Act of 1913 he would, apparently, have been regarded in England as an alien though not an alien enemy. The Divisional Court, the Court of Appeal, and the House of Lords held that, having regard to the Law of 1913, he had not lost his German nationality for all purposes whatsoever, for under that Law he could recover his German nationality more easily than a pure foreigner could acquire it; he could therefore be properly interned as an alien enemy.

Liebmann's case³ is stronger. Born in Germany in 1868, he came to England in 1889, and in 1890 obtained from the authorities of his particular State a document purporting to discharge him from German nationality. He had resided here since, but had never become naturalized. Under the North German Law of 1870 it seems probable that he would have had no special facilities for reacquisition of German nationality, and he could not have reacquired it unless, as in the case of a pure foreigner, he had established a residence in Germany. The effect, however, of section 13 of the Law of 1913 in making it easier for him to

¹ [1916] 1 K.B. 280 n.; [1916] 1 A.C. 421.

² The meaning of 'uninterrupted' residence was considered by Astbury J. at length in *Hahn v. Public Trustee* [1925] Ch. 715; it was also considered in *Page v. Leibbrand*, 8th Annual Report of the Controller of the Clearing Office (1929), p. 33, following upon an interlocutory decision reported in *Décisions des M.A.T.* vol. 5, p. 644. The relevant portions of the text of the Law of 1870 will be found at [1916] 1 A.C. 426.

³ [1916] 1 K.B. 268. See also pp. 56-60 of this book for remarks on the *habeas corpus* point in this case.

reacquire, than for a pure foreigner to acquire, German nationality made it clear that he had not entirely lost the rights belonging to a natural-born German, and the Divisional Court held him to be an alien enemy. In Weber's case nationality was lost by long residence abroad; in Liebmann's a formal discharge of nationality had been obtained, but the Court did not regard this as a difference in principle.

The effect of these decisions¹ is to draw a distinction between nationality which a person can lose, and certain rights of a natural-born subject which, in the case of a German-born subject, survive a loss of that nationality. The Law of 1913 ties these rights round his neck for life, and by its retrospective effect radically altered the status of many former German subjects. The rights belong to a former German who has divested himself of his German nationality² and by naturalization become a British subject. Supposing his naturalization to be revoked, he does not become a mere alien with no nationality, but an alien having certain of the rights belonging to a German-born subject.

Such was the effect of these two decisions, but it became necessary for Russell J. to examine them after the end of the war of 1914 to 1918 in his judgment in *Stoeck v. Public Trustee*.³ It was then easier to obtain evidence upon German law, and he had no hesitation in holding that under section 13 of the Delbrück Law 'whatever privileges are conferred by those sections (13 and 33) are equally conferred upon former Germans and upon persons who never possessed German nationality at all'. It was not necessary for him to consider section 26. It is, therefore, open to an English Court to reconsider the relevant statements in the *Weber* and *Liebmann* cases, for foreign law is a question of fact, and meanwhile they must be accepted with reserve. Even if the statements are wrong on this point⁴ as regards German law, they would be relevant to any other foreign system which might recognize a distinction between the rights appertaining to nationality and certain rights derived from being a natural-born subject and surviving loss of nationality.

¹ See a similar, though not identical, Egyptian decision—*Mayr v. Egyptian Government* (1927) *Gazettes des Tribunaux Mixtes d'Egypte*, 18th year, p. 245; 55 *Clunet* (1928) p. 1263; *Annual Digest*, 1927-1928, Case No. 371.

² But on and after January 1, 1914, when the Delbrück Law came into operation, a German on becoming naturalized abroad does not lose his German nationality if, before acquiring the new one, he has obtained the permission of the German authorities to retain his German nationality (section 25)—a provision which, if not sinister in intention, at any rate produces a most unsatisfactory state of affairs in practice.

³ [1921] 2 Ch. 67, 75.

⁴ In *Weber's* case there was another point—continued liability to German military service.

The discriminatory legislation passed under the National Socialist regime has been swept away by the Laws of the Control Council for Germany. While the 1913 law remains the basic enactment on nationality and naturalization, the repeal of the National Socialist legislation bearing on those topics must naturally give rise to questions to which it is impossible in the present state of transition to give clear answers. The best current source of information upon these matters is the *Official Gazette of the Control Council for Germany*, published in Berlin in English, French, Russian and German, the first number being dated October 29, 1945. We shall content ourselves with a few notes.

(a) The Reich Citizenship Law (Reichsbürgergesetz) of September 15, 1935, which created two classes of German nationals—citizens and mere subjects—was repealed by Control Council Law No. 1, dated September 20, 1945.

(b) The German Ordinance of November 25, 1941, which denationalized German Jews living abroad regardless of their political views or their conduct, was repealed by Control Council Law No. 1.

Upon the Ordinance of November 25, 1941, reference should be made to an article by Dr Abel, entitled 'Denationalization' in *Modern Law Review*, vol. 6 (December 1942), pp. 57-68; to a note by the same author in the same *Review*, vol. 7 (March 1945), pp. 77-80, and to *Ex parte L., Rex v. Home Secretary*¹ and *Hirsch v. Somervell & Others*.²

(c) According to the best information available, section 13 of the Delbrück law of 1913, referred to above, which provides that a former German national seeking naturalization need not, as the pure foreigner must, satisfy the requirement of the establishment of a residence (*niederlassung*) in Germany, is still in force; but there is some difference of opinion on this point. Naturalization cannot be claimed as of right.

¹ [1945] K.B. 7.

² [1946] 2 All E.R. 27. On the effect of the forcible incorporation of Austria into Germany in 1938 upon Austrian nationals, see two decisions of the U.S. Circuit Court of Appeals in 1943, *U.S. ex rel. Schwarzkopf v. Uhl* and *U.S. ex rel. D'Esquiva v. Uhl*, 137 F. 2d. 898 and 903.

ALIEN STATUS

The consideration of alienage and the status of aliens follows naturally upon the examination of British nationality, because section 27 (1) of the consolidated Act provides that in this Act, unless the context otherwise requires, "alien" means a person who is not a British subject'.¹

In what respect does an alien differ in status from a British subject? It is natural to regard the former's status as complete² and to describe the latter's by way of deduction from it. The alien has full proprietary capacity (except that he may not be the owner of a British ship³), full contractual, testamentary, and procedural⁴ capacity, but no parliamentary, municipal or other franchise, and no qualification for any public office. He owes local allegiance while within the realm, even when the British Empire is at war with his own country, and thus may be convicted of treason for assisting his own country while he is within the British Empire.⁵ The alien has no right at common law or by statute to be admitted into the King's dominions,⁶ and the Aliens Restriction Acts, 1914 and 1919,⁷ authorize the making of provision for the exclusion and expulsion of undesirable aliens. These provisions are, however, it is believed, purely declaratory, and the Crown can

¹ Article 21 of the Aliens Order, 1920, provides that 'For the purposes of this Order (1) When an alien is recognized as a national by the law of more than one foreign State or where for any reason it is uncertain what nationality (if any) is to be ascribed to an alien, that alien may be treated as the national of the State with which he appears to be most closely connected for the time being in interest of sympathy or as being of uncertain or of no nationality. . . .'

² A denizen is only partially a British subject. By denization the Crown used in former times to, and still might, confer by grant of letters patent a certain measure of nationality, and the royal prerogative has been preserved by section 25 of the Act of 1914; see Holdsworth, *History of English Law*, ix, p. 77.

³ Except as a shareholder in a British corporation (*R. v. Arnaud* (1846) 9 Q.B. 806). By section 1 of the Merchant Shipping Act, 1894, 'bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions' are qualified to be owners of British ships. The British Ships (Transfer Restrictions) Acts, 1915 and 1916, which restricted transfer and mortgage of British ships or shares therein, are now spent. And see the Ships and Aircraft (Transfer Restriction) Act, 1939.

⁴ Including, at any rate when in England, the remedy of *habeas corpus* (see the *Amand* cases discussed later at pp. 372-374), unless he is an enemy prisoner of war (see later, pp. 54-60).

⁵ And see *Joyce v. Director of Public Prosecutions* [1946] A.C. 367.

⁶ *Musgrove v. Chung Teeong Toy* [1891] A.C. 272. For the meaning of 'leave to land' in Article 3 (4) of the Aliens Order 1920, see *R. v. Governor of Brixton Prison, Ex parte Lamoy* [1942] 2 K.B. 73.

⁷ The Aliens Order, 1920, made under these Acts is also important.

exclude or expel¹ an alien at will. A British subject can neither be excluded² nor expelled; and statutory authority was required for the compulsory transportation of convicted criminals from the United Kingdom, although their destination was within the British Empire.³

Lord Atkinson in a Canadian appeal⁴ to the Privy Council stated that 'one of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.'

The Aliens Restriction (Amendment) Act, 1919, regulates (*inter alia*) both the exclusion and the expulsion of aliens. With regard to expulsion or deportation—the latter term is said to connote some control over the destination—questions have sometimes arisen upon the claim, amounting almost to a necessity, of the Crown in the exercise of this right to impose a certain measure of extra-territorial restraint upon the alien. Blackstone⁵ says that aliens are 'liable to be sent home whenever the king sees occasion', and both in *A.-G. for Canada v. Cain*⁶ and *Rex v. Home Secretary, ex parte Duke of Chateau Thierry*,⁷ arising upon statutes and regulations thereunder, the Privy Council in the former case, and the Court of Appeal in the latter, in effect justified extra-territorial constraint. The constraint was direct in the former case and indirect in the latter, where the Home Secretary was permitted to select the ship (and incidentally control the alien's destination) and to place the alien on board so that

'he remains in legal custody until the ship finally leaves the United Kingdom, and then the custody of and right to detain the alien ceases. It is quite possible that the result of action under this provision may be that the deportee from the force of circumstances may be compelled to disembark in the country to which the Government wish him to go.'⁸

The Aliens Restriction (Amendment) Act, 1919,⁹ imposed a number

¹ See Oppenheim, i, §§ 323, 324; *Netz v. Ede* [1946] Ch. 224. As to the effect of liability to deportation upon the acquisition of a domicile of choice, see *Boldrini v. Boldrini* [1932] P. 9 and *May v. May and Lehmann* [1943] 2 All E.R. 146.

² Under Defence Regulation 18, however, his entry may be controlled.

³ Blackstone's *Commentaries*, i, 137.

⁴ *A.-G. for Canada v. Cain* [1906] A.C. 542, 546.

⁵ *Commentaries*, i, 260.

⁶ *A.-G. for Canada v. Cain* [1906] A.C. 542.

⁷ [1917] 1 K.B. 922 (C.A.).

⁸ *Ibid.* at p. 934.

⁹ As amended by certain Defence Regulations.

of new disabilities upon aliens, some of which were removed by the Former Enemy Aliens (Disabilities Removal) Act, 1925, but many still remain, particularly in connexion with shipping.¹

Act of State. The friendly alien resident in the United Kingdom is entitled to the benefit of the rule that the defence known as 'act of State' cannot be pleaded against him by the Crown or by a Government official,² though that is a valid defence against an alien resident abroad,³ who is thereupon referred to any remedy there may be through the diplomatic channel. Thus, as Professor Holdsworth has pointed out,⁴ the common law, having recognized by the end of the sixteenth century the right of the friendly alien in our midst to sue in tort, permitted him to participate in one of the logical consequences of the subsequently developed doctrine of ministerial responsibility—a remarkable instance of the liberality of our legal institutions.

STATELESSNESS

It was not until 1921 that an English Court was squarely faced with the question whether English law recognized the condition of statelessness, though English international lawyers such as Hall⁵ and Oppenheim⁶ had asserted that condition to be recognized by international law without throwing any doubt upon its recognition by English law. Then Russell J. in *Stoeck v. Public Trustee*,⁷ after mentioning an *obiter* statement to the contrary by Phillimore L.J. in *Ex parte Weber*,⁸ unhesitatingly pronounced in favour of its recognition, and this view is now generally accepted. Stateless persons are aliens, because, as we have seen, section 27 (1) of the consolidated Act provides that 'In this Act, unless the context otherwise requires...the expression "alien" means a person who is not a British subject'.

In recent decades the manufacture of stateless persons has been speeded up, for instance, by wholesale measures⁹ of denationalization upon

¹ Dicey, Rules 31 and 51, and Temperley, *Merchant Shipping Acts* (4th ed. 1932), pp. 1-3.

² *Johnstone v. Pedlar* [1921] 2 A.C. 262.

³ *Buron v. Denman* (1848) 2 Ex. 167. *Johnstone v. Pedlar*, *supra*, and in the Irish Court of Appeal [1920] 2 I.R. 450. Whether the defence is only available against the alien resident abroad in the case of an act done abroad is not yet clear—*Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. at pp. 290, 297; and Oppenheim, i, § 148 (n).

⁴ *History of English Law*, ix, pp. 97, 98.

⁵ (7th ed.), § 74.

⁷ [1921] 2 Ch. 67.

⁶ (2nd ed.), i, pp. 387-389.

⁸ [1916] 1 K.B. 280, 283.

⁹ See Fischer Williams in *British Year Book of International Law* (1927), pp. 45-61, and Abel in *Modern Law Review*, vol. 6 (1942), pp. 57-68.

political, racial and religious grounds.¹ At the same time something has been done for the protection of these persons—now increasingly also ‘refugees’—for instance, by means of certain Conventions and Protocols emanating from the Hague Codification Conference of 1930 upon Nationality (amongst other matters), and the Convention of October 28, 1933, relating to the International Status of Refugees, under which Nansen passports were issued.² Thus the stateless person’s original disadvantage of having no State to look to for protection has to some extent been mitigated, and the status has become less of an abnormality.

EFFECT OF OUTBREAK OF WAR UPON ALIENS

We have already discussed the meaning of ‘war’, and we must now consider how the outbreak of war affects the status of aliens.

First of all, it divides them into (1) *Alien Enemies*, and (2) *Alien Friends*, with sometimes, as in the War of 1914 to 1918 and in the recent war, a further subdivision of alien friends into (a) allies and (b) neutrals.³ With alien friends, whether neutrals or allies,⁴ when resident in their own countries, our law has little concern except—as the decisions of our Prize Court show—in so far as war affects them in their trading relations. As residents in our midst and litigants in our courts, war does not—apart from special statutes and administrative regulations—affect them except in the same way that it affects our own citizens. Among these special statutes are the Aliens Restriction Acts,

¹ An enemy decree made during war and purporting to make enemy nationals stateless will not be recognized by British Courts—at any rate during the war: *Rex v. Home Secretary, Ex parte L.* [1945] K.B. 7 and p. 32 above, and note in 61 L.Q.R. (1945), p. 126.

² See Oppenheim, i, § 313, for some description of these Conventions.

³ We need not concern ourselves with the modern political hybrids who describe themselves as ‘non-belligerents’ or ‘pre-belligerents’. ‘Allies’ means ‘belligerent allies’. In the War of 1914 to 1918 the United States of America were not an Allied Power but an Associated Power. I am not aware that the legal distinction between the subject of an Allied and the subject of an Associated Power arose, but I do not doubt that our Courts would treat the subject of a co-belligerent Associated Power as the subject of an Allied Power. Note that the Allied Forces Act, 1940, draws a distinction between allied and associated forces (section 1 (2)).

⁴ The Allied Powers (War Service) Act, 1942, empowered His Majesty to apply to the nationals of Allied Powers who are in Great Britain or subsequently enter it, the provisions of the National Service Acts, 1939 to 1941, as if they were British subjects and thus render them liable to service with the British Forces. For the War of 1914 to 1918, see the Military Service (Conventions with Allied States) Act, 1917. Note the distinction between a ‘foreign Power’, which can be allied to His Majesty, and a ‘foreign authority’, which apparently cannot be. The Allied Powers (Maritime Courts) Act, 1941, applied only to allied and associated Powers. And see Defence (General) Regulation 104 A, para. 8. For ‘co-belligerent’ see note at end of this chapter.

1914 and 1919.¹ They arm the Executive with wide powers, in the event of war or 'an occasion of imminent national danger or great emergency', to regulate aliens—enemies or friends—as to landing, embarking, deportation, residence in certain districts, registration, change of abode, travelling, etc.; and such regulations may be made to relate to any particular class of aliens. A very drastic provision is contained in section 1 (4) of the Act of 1914, which provides that a man is deemed to be an alien or an alien of a particular class until and unless he disproves it, so that if the police or the military authorities arrest any one of us and charge him with being an unregistered alien enemy, the burden of proof lies upon him to show that he is a British subject. Existing powers with respect to the expulsion and exclusion of aliens are preserved.

POSITION OF ALIEN ENEMIES

Let us now consider the position of alien enemies who happen to be in this country at the date of the outbreak of war. In ancient times the rule was that their persons could be seized and their goods confiscated by any one; they had no rights. The practice of making treaties stipulating for a right of exit to their own country led to what became almost a rule of international law permitting the departure within a reasonable time of all alien enemies who are not combatants, either active or reservists, in the enemy forces. Thus on August 5, 1914, the Home Office announced that, in pursuance of an Order in Council made under the Aliens Restriction Act, 1914, alien enemies might, until August 10, depart without special permit from any one of a number of specified ports and that thereafter they could only leave by special permit. Reservists and other combatants were, however, detained as prisoners of war. It is believed that the German Government followed a more severe course, detaining all men whom they considered to be of military age. However, there is no rule which requires a belligerent to allow enemy subjects to remain in his territory, and he is entitled to expel them if he chooses. If he allows them to remain, he is entitled to place restrictions upon their freedom such as are made under the Aliens Restriction Acts, 1914 and 1919, as amended by a number of Defence Regulations made in and after 1939. Numerous restrictions have been made, partly as to all aliens, and partly as to alien enemies only, particularly as to registration and residence, notification of movements, and change of name, and as to the possession by alien

¹ As amended by Defence Regulations, see above, pp. 33-35.

enemies of certain articles, ranging from fire-arms to pigeons and cipher codes. Further, the Registration of Business Names Act, 1916, provides for the registration of all firms and individuals carrying on business (including a profession) in the United Kingdom under any name other than the true, and (apart from the change of a woman's name by marriage) original, surnames of the partners or individuals.

Having regard to the Aliens Restriction Acts, 1914 and 1919, and the Defence Regulations, and the comprehensive powers which they confer on the Executive, it is perhaps somewhat academic to consider what is the common law position. It is, however, interesting to notice an enlightened anticipation of subsequent practice contained in cap. 41 of Magna Carta,¹ dating from days before the idea of International Law in the present sense had been conceived:

'Merchant strangers in this realm. . . And if they be of a land making war against us and be found in our realms at the beginning of wars, they shall be attached without harm of body or goods until it be known to us or our Chief Justice how our merchants be intreated there in the land making war against us, and if our merchants be well intreated then theirs shall be likewise with us.'²

The attitude of the common law is illustrated by *Sylvester's Case*:³

'If an alien enemy come into England without the Queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here;⁴ but if he has a general or a special protection, it ought to come of his side in pleading.'

It does not appear what the action was for, but 'alien enemy' was held a good plea in abatement.

Definitions of alien enemy. Any definition of an 'alien enemy', if it is to be of any use at all, should state clearly the point of view from which the matter is approached. Broadly speaking, there are two main tests (the national and the territorial), and two main points of view from which, or purposes for which, a test is necessary. If we desire to ascertain a man's personal rights and liabilities, for instance, whether he is liable to be interned, whether he may live in a special area, or

¹ See Hague Convention VI (Status of Enemy Merchant Ships on the Outbreak of War), no longer binding on Great Britain, for a similar idea.

² Upon this Blackstone quotes the remark of Montesquieu that 'the English have made the protection of *foreign* merchants one of the articles of their *national* liberty.' *Commentaries*, I. 260.

³ (1702) 7 Mod. 150. See also 1 Dyer 2 b.

⁴ This has been greatly modified by cases decided during the War of 1914 to 1918—see *Rodriguez v. Speyer Brothers* [1919] A.C. 59, and the next chapter.

whether he comes under some particular clause of the Aliens Restriction Acts, then nationality is the main test. Of which State is he a subject? To which State does he owe permanent allegiance? But if our object is to ascertain his position as a contractor, as a trader, as a litigant, as one with whom it is desired to have intercourse, personal or commercial, then our main test becomes his locality in some form or another. Sometimes this test takes the form of 'voluntary residence', sometimes 'the place where he carries on business', sometimes merely the place where he happens to be. If he is voluntarily resident, or carrying on business, or perhaps merely *is*, without a residence or a business, in enemy territory, then, whatever his nationality may be, enemy, neutral, allied, or British, he is an alien enemy for purposes of litigation and intercourse in the widest sense.

To put the matter shortly, it is lawful for a London tradesman to continue to supply goods to a customer of enemy nationality living in London. It is unlawful for a resident of London to continue to hold intercourse, personal or commercial, with a correspondent, even of British nationality, carrying on business or voluntarily resident in enemy territory.

These are very general statements. In the next chapter we shall examine in detail both the common law, and the statutory, definitions of 'enemy', and the early history of the status of alien enemies will be found in the Appendix.¹

¹ At p. 403.

(From n. 4 on p. 36.) 'Co-belligerent' can hardly yet be described as a technical term, but it is used when the word 'ally' would for one reason or another be inappropriate. Thus in 1917 the Polish National Army, and in 1918 the Czechs and the Slovaks before they were recognized as a State, were called 'co-belligerents', and in 1943 the word was applied to Italy under the Badoglio Government fighting in association with the United Nations; see Oppenheim, ii, § 76a.

CHAPTER 3

PROCEDURAL STATUS OF ALIEN ENEMIES

(For the history, see the Appendix at p. 403)

The War of 1914 to 1918 afforded opportunities of establishing the law governing the procedural capacity of alien enemies on a sure foundation, and we shall try to state it.

The main test of enemy character for this purpose is a territorial one, not a national one. A person of any or no nationality voluntarily resident or present or carrying on business in territory owned or occupied by an enemy Power is an enemy for procedural purposes.¹ An enemy national in British territory, who has complied with any requirements and restrictions imposed upon him as a matter of general policy, is deemed to have the permission of the King to be in this country and is said to be within the protection of the King; he is not an enemy for procedural purposes. We shall call him an enemy 'in protection'.

We shall now formulate and substantiate three general rules² and call attention to qualifications upon them later:

A. An enemy national in this country who is not 'in the King's protection', and a person of any or no nationality who is an enemy in the territorial sense,³ has no right of access to an English Court during the war as a plaintiff or other actor in any proceedings, except by licence of the Crown.⁴

¹ For the position of Corporations, see below, pp. 63-65.

² The law of Scotland is substantially the same. A number of Scottish cases are reviewed by Lord Thankerton in *V/O Sovfracht v. N.V. Gebr. Van Uden's Scheepvaart en Agentuur Maatschappij* [1943] A.C. 203, 214-217. For the law of the United States of America and some other countries, see Garner, *International Law and the World War*, vol. i, chap. v; Borchard in 27 *Yale Law Journal*, p. 105; *Annual Digest*, 1919-1922, Case No. 283 (United States Court for China); *Ex parte Kawato* (1942) 317 U.S. 69; and the *Annual Digest*, *passim*.

³ Which, of course, includes an enemy Government; for an American decision upon a statutory definition of 'enemy', see *Ex parte Colonna*, 314 U.S. 510.

⁴ In examining many of the cases to which it will be necessary to refer, it is useful to bear in mind a distinction which is apt to be obscured—particularly when an action by an enemy plaintiff fails. A successful defence may result from the procedural disability of the plaintiff, in which event it may be cured by the cessation of a state of war or its equivalent, or from a substantial defect in his cause of action such as original or supervening illegality, which would not be cured by the cessation of a state of war, or from both defects. Probably the older and stricter system of pleading would make this distinction more easily perceptible. Rowlatt J. in *Schmitz v. Van der Veen & Co.* (1915) 84 L.J.K.B. 861, 864, has stated the point as follows: 'It is essential to distinguish carefully between these two cases—that is to say, that where the cause of action is unexceptionable, but the plaintiff as an alien enemy is temporarily and personally incapable of being received as a plaintiff, and that where the cause of action, whoever puts it forward, fails in itself,

B. The above-mentioned persons, and the enemy 'in the King's protection', may be sued in an English Court during the war in the same way as a British subject, though with some of them difficulties of service may arise.

C. An enemy 'in the King's protection' has, with one exception,¹ the same procedural capacity as a British subject.

The leading authority for these three rules is the group of three cases, *Porter v. Freudenberg*, *Kreglinger v. S. Samuel and Rosenfeld*, and *In re Merten's Patents*, which were decided by a full Court of Appeal in January 1915, and are usually referred to by the title of the first of them.² To these we must add the general approval given by the House of Lords in *V/O Sovfracht v. N.V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*³ (which we propose to refer to in future as 'the *Sovfracht* case') to the leading propositions contained in *Porter v. Freudenberg*.

In *Porter v. Freudenberg*, after quoting Lord Lindley's statement in *Janson v. Driefontein Consolidated Mines*⁴ that 'the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy', the Court proceeded to elaborate the other side of the definition by stating⁵ that

'For the purpose of determining civil rights a British subject or the subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident⁶ in hostile territory.'

The distinction is between, on the one hand, the enemy in the territorial sense together with such enemies in this country as may not be 'in protection', against whom the plea of alien enemy is valid, and, on the other hand, the enemy 'in protection', against whom it is not, that is, the alien enemy who in the older language is within the realm

and fails finally.' He then quoted Lord Ellenborough C.J. in *Flinth v. Waters* (1812) 15 East 260, 265: 'the defence of alien enemy... may go to the contract itself on which the plaintiff sues, and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal, in respect to the capacity of the party to sue upon it'. See Bullen and Leake, 3rd ed., p. 475.

¹ *Liebmann's case* [1916] 1 K.B. 268. See later, pp. 54-60.

² [1915] 1 K.B. 857 (C.A.). See also *Princess Thurn and Taxis v. Moffitt* [1915] 1 Ch. 58 (plaintiff enemy 'in protection'); *Robinson & Co. v. Continental Insurance Co. of Mannheim* [1915] 1 K.B. 155 (defendant enemy in territorial sense); *Kraus v. Kraus and Orbach* (1919) 35 T.L.R. 637 (petitioner enemy 'in protection' and interned).

³ [1943] A.C. 203.

⁴ [1902] A.C. 484, 505.

⁵ At p. 869.

⁶ 'Resident in' in this connexion has not a technical meaning and probably means no more than 'living or being in'. For the position of Corporations, see below, pp. 63-65.

by licence of the King, or, as it is also put, 'has continued here by the King's leave and protection',¹ or has come here 'under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*'.² What exactly does this mean?

The enemy within the King's protection. The Aliens Restriction Act, 1914, passed immediately after the outbreak of the War of 1914 to 1918, and the Aliens Restriction Orders made thereunder, required (*inter alios*) alien enemies to register themselves by supplying to a registration officer certain particulars concerning themselves.³ It fell to the lot of Sargant J. in *Princess Thurn and Taxis v. Moffitt*⁴ to give the first High Court decision upon the procedural effect of compliance with this Order, and his judgment received the approval of the full Court of Appeal in *Porter v. Freudenberg*. In the *Princess Thurn and Taxis* case the action was pending at the outbreak of war, and the plaintiff is stated⁵ to have resided in the United Kingdom. She had complied with the Order in Council, and the defendant's application to stay all proceedings on the ground that she was an alien enemy was refused. Her husband, a national of Austria-Hungary, and thus an enemy, was 'abroad and probably engaged in fighting against this country'. Lord Reading C.J.,⁶ in approving the decision, observed that 'such an alien [i.e. as the plaintiff] is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country, and has been allowed thereafter to remain here. He is "sub protectione domini regis".' That seems to be the essential point. An enemy cannot be said to have the licence or be under the protection of the Crown unless he has taken the prescribed steps—be it registration or be it something else⁷—to make the Crown aware of his presence and to imply the Crown's consent. Many of the decisions given during the War of 1914 to 1918 in which enemy plaintiffs were allowed to sue, expressly state that they had complied with the obligation to register themselves. That obligation existed during the recent war,⁸ and it is unlikely that any enemy plaintiff would be allowed to sue unless

¹ In *Wells v. Williams* (1697) 1 Ld. Raym. 282, 283; 1 Salk. 46; 1 Lutw. 34.

² In *The Hoop* (1799) 1 C. Rob. 196, 201.

³ For an earlier instance see 43 Geo. III, c. 155, s. 22.

⁴ [1915] 1 Ch. 58 (an action in tort); see also *Volkl v. Rotunda Hospital* [1914] 2 I.R. (K.B.D.) 543 (also in tort).

⁵ At pp. 59 and 61.

⁶ [1915] 1 K.B. 857, 874. So also in Scotland, *Schulze v. Bank of Scotland* (1914) 2 S.L.T. 455, and *Weiss v. Weiss* (1940) S.L.T. 447.

⁷ See *Von Petersdorff v. Insurance Co. of N. America* (1944) 46 N.Y.S. 2d. 651, for an enemy under order of deportation being allowed to sue.

⁸ Under the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920, as amended from time to time.

he had complied with it or could shew that in some other lawful manner he had made the Crown aware of his presence and had been allowed to remain.¹

Comment upon and qualifications of these rules

After these rather general statements it will be convenient to consider the matter under the following headings:

1. *Enemy plaintiffs:*²

- (a) the legal character of the plea;
- (b) in action pending at the outbreak of war;
- (c) co-plaintiff;
- (d) suing in representative capacity;
- (e) non-enemy suing on behalf of enemy;
- (f) enemy in foreign non-enemy territory;
- (g) non-enemy in enemy territory;
- (h) non-enemy in enemy-occupied territory;
- (i) enemy prisoners of war, and enemies interned in British territory or repatriated;
- (j) enemy, wherever he may be, by reason of identification with the enemy Power, either by adherence to it or by control from enemy sources;
- (k) corporation;
- (l) in interpleader issue;
- (m) in Prize Court proceedings;
- (n) the statutory enemy;
- (o) suing by Royal licence.

2. *Enemy defendants.*

¹ *Boulton v. Dobree* (1808) 2 Camp. 163, 165: 'Although he went at large, it did not appear that government knew he was in the kingdom'—per Lord Ellenborough C.J.; *Alciator v. Smith* (1812) 3 Camp. 245, 246: 'There is no evidence that government knew of her being in this kingdom at the time when the action was commenced'—per Lord Ellenborough C.J.

On the effect of subsequent internment, see below, pp. 57–60.

I apprehend that if a person who has never done what is necessary to obtain the licence of the Crown is interned, he would nevertheless acquire the status of an internee, see pp. 59–60.

² In the extensive sense denoting an actor in any proceedings. The following cases shew what is meant by 'actor': *The Charlotte* (1813) 1 Dods. 212 (claimant in prize) and see later, p. 66; *Porter v. Freudenberg* [1915] 1 K.B. 857, 883, 884, 890 (defendant appellant not an actor) (as to bankruptcy, see later, p. 73); *Halsey v. Lowenfeld* (*Leigh and Curzon, Third Parties*) [1916] 2 K.B. 707 (C.A.) (defendant taking third party proceedings); *Geiringer v. Swiss Bank Corporation* [1940] 1 All E.R. 406 (interpleader); the *Sovfracht* case [1943] A.C. 203 (summons for appointment of umpire).

3. *Enemy appellants.*

4. *Bankruptcy.*

We shall then consider the effect of

5. *The Statutes of Limitation.*

I. ENEMY PLAINTIFFS

(a) *The legal character of the plea of alien enemy.* Does the validity of the plea result from a strict rule of law or does it depend upon the discretion of the Court in applying a flexible rule of public policy?¹ This is not a purely theoretical question, as the decision in *Rodriguez v. Speyer Brothers*² shews. Upon the theory there hangs a practical result. The House of Lords in that case had to consider whether the fact that one of the plaintiffs, six persons who until the outbreak of war carried on business in partnership in London, was an alien enemy in the territorial sense (he was also an alien enemy in the national sense), was fatal to their recovery during the war of a debt due to the late firm. By a majority, Lord Finlay L.C., Lord Haldane and Lord Parmoor (Lord Atkinson and Lord Sumner dissenting), the House of Lords held that the action was maintainable. Lord Haldane, who was rather fond of 'a broad issue of principle', stated the issue as follows:³

'Is the rule which prevents an enemy alien from suing in the King's Courts a crystallised proposition which forms part of the ordinary common law, and is so definite that it must be applied without reference to whether a particular case involves the real mischief to guard against which the rule was originally introduced? Or is the rule one of what is called public policy, which does not apply to a particular instance if that instance discloses no mischief from the point of view of public policy?'

The majority preferred the latter explanation of the rule. Surely the best way to ascertain the true character of a rule of the common law is to examine its history, and in this case, unless the historical examination contained in Professor Holdsworth's ninth volume⁴ and in the Appendix to this book⁵ is wrong, we can find no warrant for saying that Coke and his predecessors who established the rule of the disability of the alien enemy plaintiff regarded the rule as anything but an unqualified rule.⁶

¹ In *Driefontein Consolidated Mines v. Janson* [1900] 2 Q.B. 339 Mathew J. allowed the defendant to waive the plea of alien enemy, but this practice was adversely criticized in the House of Lords by Lord Davey [1902] A.C. 484, 499, and is not likely to occur again.

² [1919] A.C. 39.

³ At p. 77. See below, p. 47.

⁴ *History of English Law*, ix, pp. 98, 99 and note 1 on p. 99.

⁵ P. 403.

⁶ Note Eyre C.J. in *Sparenburgh v. Bannatyne* (1797) 1 Bos. & P. 163, 170.

The fact that at a date subsequent to its establishment a rule of the common law should be found to be in accord with public policy does not entitle us to say that it can be applied or not be applied according to discretion as in the case of the rule which discourages unreasonable restraints of trade.

However, the law is now settled (or unsettled) by *Rodriguez v. Speyer Brothers*,¹ though we think there will be many *qui malunt errare cum* Lord Sumner in one of his most penetrating and characteristic speeches. Professor Holdsworth says:

'The only doubtful question which was never quite settled, was whether an alien enemy, who was an executor or administrator to a subject, could sue in his representative capacity.'²

But, as Lord Sumner points out,³

'it is only possible to say that Herr von Speyer is on the record here, suing en autre droit, by assuming that, as against the defendant, he sues as trustee for certain beneficiaries, the other partners in Speyer Brothers of 1914 to wit. A trustee he is not, nor is he so described on the writ; and if he was, he would still sue for his own benefit as well, and not purely en autre droit.'

(b) *Plaintiff in action pending at the date of the outbreak of war.*⁴ Is such a plaintiff in any better position than one who issues his writ during time of war? Oppenheim stated in earlier editions⁵ that 'if during time of peace a defendant obtains an opportunity to plead, and if subsequently war breaks out with the country of the plaintiff, the defendant may not plead that the plaintiff is prevented from suing', citing *Shepeler v. Durant*;⁶ but it is submitted that this statement is not

'I take the true ground upon which the plea of alien enemy has been allowed is, that a man professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country.'

¹ The House of Lords have in the *Sovfracht* case substantially repaired the damage done by the majority speeches in *Rodriguez v. Speyer Brothers*.

² See below, p. 48.

³ [1919] A.C. at p. 119.

⁴ For our present purpose enemy-occupied territory is in the same position as enemy territory, so that the act of occupation by the enemy would have the same effect upon pending proceedings instituted by a plaintiff resident there as the outbreak of war would have in the case of pending proceedings instituted by a plaintiff resident in enemy territory: the *Sovfracht* case, *supra*.

⁵ *International Law*, e.g. the second, ii, p. 133.

⁶ (1854) 14 C.B. 582. It does not appear from the report whether or not the plaintiff was resident in Russia, but it seems likely that he was as the contract was made there. There are three other reports, but they throw no further light on the case.

borne out by the cases. In *Le Bret v. Papillon*,¹ an action in *assumpsit* on a French judgment, the plaintiff had exhibited his bill against the defendant, when subsequently war broke out between their respective countries. The defendant pleaded (*inter alia*) that the plaintiff was now an alien enemy, to which the latter replied that that did not matter, as he was not an alien enemy when he exhibited his bill. The Court held that the plaintiff was 'barred from further having or maintaining his action'. Lord Sumner pointed out in *Rodriguez v. Speyer Brothers*² that in *Le Bret v. Papillon* 'the objection of enemy character was wrongly pleaded in bar and not in abatement', and that 'the Court held that notice must be taken of the plaintiff's incapacity, although it was not properly pleaded'. In *Vanbrynen v. Wilson*³ a motion to stay judgment and execution, on the ground that the plaintiffs had become enemies since the verdict, was refused summarily, but the defendant was left to move formally, so that the case does not decide the point of substance.⁴

In *Shepeler v. Durant* the plaintiff, a Russian subject, suing in the Court of Common Pleas upon a pre-war contract for the sale of timber, delivered his declaration on March 15, and on the 23rd the defendant obtained an order for time to plead on the usual terms. On the 28th war was declared against Russia, and the defendant took out a summons to stay proceedings on the ground that the plaintiff had become an alien enemy, or, in the alternative, for leave to plead such a plea in abatement. In April the summons was refused on the ground that the defendant by the terms on which he had obtained on March 23 an order for time to plead, namely, to plead issuably,⁵ was by the rules of pleading then in force precluded from entering such a plea as that of alien enemy. No authorities are cited in the report, and it is submitted that the case turns purely on an obsolete rule of pleading, and is of no authority at the present day.

In November 1854, in the Queen's Bench, the defendant in the case

¹ (1804) 4 East 302.

² [1919] A.C. 59, 109.

³ (1808) 9 East 321.

⁴ See Lord Sumner, *ibid.*

⁵ 'An issuable plea is one which puts the merits of the case in issue, either on the facts or on the law, and upon which a decision on demurrer or by a jury would determine the action upon the merits': Bullen and Leake, *Precedents of Pleadings* (3rd ed. 1868), p. 440. The authors add (on p. 441) that a plea of alien enemy is not an issuable plea, citing *Shepeler v. Durant*, where it was described as a dilatory plea, as it was in that case which was an action upon the breach of a pre-war contract which would be enforceable after the war. If, to use the words of Lord Ellenborough C.J. in *Flindt v. Waters* (see above, p. 40, n. 4), the plea of alien enemy had gone 'to the contract itself', e.g. asserted the abrogation by the outbreak of war of a pre-war executory contract, would not this have been an issuable plea?

of *Alcinous v. Nigreu*¹ pleaded that the plaintiff, a Russian, was an alien enemy, was residing in the kingdom without the licence, safe-conduct, or permission of the Queen, and 'has become such enemy as aforesaid since the last pleading in this action'. On demurrer the Court (Lord Campbell C.J., Coleridge, Wightman and Erle JJ.) upheld the sufficiency of the plea. No cases are cited, and the plaintiff's counsel is not reported to have argued the point taken successfully in the earlier case, *Shepeler v. Durant*.

Alcinous v. Nigreu may not be very clear as to the circumstances of the plaintiff's residence here, but it certainly follows *Le Bret v. Papillon* and casts doubts upon *Shepeler v. Durant*. In *Von Hellfeld v. Rechnitzer*,² where the pleadings were closed on July 31, 1914, i.e. before the outbreak of war, the plaintiff, an alien enemy, was not allowed to proceed with his action. There can be no doubt to-day that the fact that the writ was issued or the pleadings closed before the outbreak of war, does not enable an alien enemy to continue his action during the war. The outbreak of war after verdict and before judgment must also, it is submitted, despite *Vanbrynne v. Wilson*, put a stop to further proceedings.

But the fact that upon the outbreak of war a plaintiff in a pending action becomes an alien enemy need not in a proper case—at any rate when it is possible to serve notice of motion upon his solicitor—prevent the Court from striking out his statement of claim on the ground that it discloses no cause of action, for it is not fair to the defendant that such an action should be left hanging over him until after the war merely because the plaintiff is an alien enemy.³

(c) *Enemy co-plaintiff*. As has already been seen,⁴ it was decided by the House of Lords in *Rodriguez v. Speyer Brothers* that the fact that it is necessary to join an enemy as co-plaintiff with British and neutral subjects whose partner he formerly was, does not enable the action to be defeated by the plea of alien enemy. This decision is considered to have approved *Mercedes Daimler Motor Co. v. Maudslay Motor Co.*,⁵ where of two joint owners of a patent the British owner had the sole

¹ (1854) 4 El. & Bl. 217.

² *The Times* newspaper, December 11, 1914; on September 30, 1914, the plaintiff left England under British permit and went to Amsterdam.

See also the Scottish decision *Gebr. van Uden v. Burrell* [1916] S.C. 391, and an American decision cited by Baty and Morgan, *War, Its Conduct and Legal Results*, p. 284, *Hutchinson v. Brock*, 11 Mass. 119.

³ *Eichengruen v. Mond* [1940] Ch. 785; and see *Geiringer v. Swiss Bank Corporation* (a case of interpleader), below, at p. 65.

⁴ P. 44.

⁵ (1915) 31 T.L.R. 178.

right of bringing actions for infringement and the right to join a German co-owner as a co-plaintiff, and the action was allowed, and *J. B. Rombach Baden Clock Co. v. Gent*,¹ where of three partners in a firm dissolved by the outbreak of war one was British, a second an enemy 'in protection' and the third an enemy in both the national and territorial senses, and the firm was allowed to sue because the action was in substance the receiver's action for the collection of a debt, the receiver being the British ex-partner.²

(d) *Enemy suing as executor or administrator or in some other representative capacity on behalf of one who is not an alien enemy.* This question must be regarded as still open,³ but in the speeches of the majority in *Rodriguez v. Speyer Brothers* there is much *obiter* authority in favour of the view that the action would lie.⁴

(e) *Non-enemy plaintiff suing on behalf of enemy.* Formerly there existed a fairly rigid rule to the effect that a non-enemy could not bring an action which was in substance for the benefit or in favour of an enemy.⁵ There has, however, been a tendency to modify the rigour of this rule, and this relaxation is perhaps traceable to the appointment, in the War of 1914 to 1918 and in the present war, of a Custodian of Enemy Property. In the absence of such machinery it was clearly dangerous to allow a plaintiff to sue if he was in effect suing for the benefit of an enemy. Now, if money is due to an enemy, it is more reasonable—from the British as well as the enemy's point of view—that it should go to the Custodian than that it should be retained by a debtor who has no right to it. Accordingly in *Schmitz v. Van der Veen & Co.*,⁶ Rowlatt J., after holding that Schmitz, a naturalized British subject, who had sold goods to the defendants, had sold them

¹ (1915) 84 L.J. K.B. 1558.

² See later, p. 286.

³ See, in addition to the majority speeches in *Rodriguez v. Speyer Brothers*, Holdsworth, *op. cit.* ix, pp. 98, 99 and note 1 on p. 99. A number of old decisions will be found in the *English and Empire Digest*, ii, p. 158.

⁴ For a case in which the alien enemy administrator of the estate of an alien enemy was not allowed to sue, see *H.C. van Hoogstraten v. Low Lum Seng* (1939) Federated Malay States, p. 180; *Annual Digest*, 1938-1940, Case No. 16. In *Azazh Kebbedda Tesema v. Italian Government* the Palestine Supreme Court dismissed upon the outbreak of war with Italy a pending action in which that State was plaintiff: *Annual Digest*, 1938-1940, Case No. 36. In *Compagnie française de l'Afrique occidentale v. The Otho* (57 F. Supp. 829) a United States District Court permitted a British insurance company to sue by subrogation from an assured domiciled in enemy-occupied territory.

⁵ E.g. *Brandon v. Nesbitt* (1794) 6 T.R. 23; *Bristow v. Towers*, *ibid.* 35; as explained in *Flindt v. Waters* (1812) 15 East 260, 265: see above, p. 40, n. 4.

⁶ (1915) 84 L.J. K.B. 861. And see *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* [1941] 1 K.B. 424.

as a principal and not as the agent of an enemy, rejected the defence that he was suing for the benefit of an enemy and allowed him to recover judgment for the price of the goods, subject to a stay of execution pending the making of an order for vesting the proceeds in the Custodian. Nor did the learned judge overlook the fact that this form of judgment benefited the enemy by improving his prospect of ultimately recovering the money. This decision has recently been followed in *Weiner v. Central Fund for German Jewry*,¹ where the plaintiff had deposited with the defendants in June 1939 the sum of money required by them before they could sponsor the application (for permission to enter this country) of two persons in Vienna, now enemies, and was suing for the return of the money on the ground of breach of contract or failure of consideration; he admitted that any sum recovered by him ought to be handed over to the Custodian, and Singleton J., rejecting the defence that the action was one for the benefit of an enemy, gave judgment in a form similar to that given in *Schmitz v. Van der Veen & Co.* We suggest, however, that the value of these two decisions will require reconsideration in the light of the speeches in the House of Lords in the *Sovfracht* case,² and particularly of the Lord Chancellor's fifth and sixth propositions.

(f) *Enemy in foreign non-enemy territory.* In *Janson's* case³ Lord Lindley stated *obiter* that 'the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy', and this *dictum* was followed in the case of *Re Mary, Duchess of Sutherland, Bechoff, David & Co. v. Bubna*.⁵ The plaintiff firm consisted of three partners carrying on business in Paris, that is, in allied territory, and, at the time of the issue of the writ, all resident in Paris. One of them was a German subject who, after the issue of the writ and two days before war between this country and Germany broke out, left Paris for Spain, where he had since resided. Warrington J. refused an application to stay the proceedings based on

¹ [1941] 2 All E.R. 29.

² [1943] A.C. 203, 212.

³ [1902] A.C. 484, 505. See also *J. G. White Engineering Corporation v. Canadian Car and Foundry Co.* [1940] 4 Dominion Law Reports, 812 (Canadian), *Annual Digest*, 1938-1940, Case No. 207: enemy domiciled in neutral country and temporarily resident in allied country; and '*Parfums Tosca*' v. *Peschaud*, *Annual Digest*, 1938-1940, Case No. 213 (French).

⁴ Macgillivray, *Insurance Law* (2nd ed. 1937), p. 277, suggests that 'an enemy subject resident in a neutral State is not so clearly divested of enemy character [as when resident in an allied State]. There is no restraint upon his power to return to his own country, and his residence in a neutral country does not import any renunciation of his enemy character or acceptance of British or allied protection.'

⁵ (1915) 31 T.L.R. 248; *ibid.* 394 (C.A.); see also Younger J. in *Schaffenius v. Goldberg* [1916] 1 K.B. 284, 291, 293, where he took the same view.

the ground that one of the plaintiffs was an alien enemy, and the Court of Appeal, although the case does not appear to have been argued to a conclusion, were evidently in sympathy with the judgment of the Court of first instance. This inclination to allow an enemy subject resident in a neutral country to sue in an English Court receives some support from the judgment of Eve J. in the cases of *Re Grimthorpe's Settlement*, *Lord Islington v. Countess Czernin* and *Beckett v. Countess Czernin*,¹ where the learned judge directed certain income to be paid to the Countess, an enemy subject, then resident in Rome (that is, in allied territory), so long as she resided in allied, neutral or British territory. Her husband was apparently still resident in Austria, and in October 1914 they had obtained from a Vienna Court upon their joint petition a decree of separation *a mensa et thoro*.

Will the position of the enemy plaintiff who is resident or carrying on business in a neutral country be adversely affected by being associated with, or interested in, a firm carrying on business in an enemy country?

The Scottish case of *Gebr. van Uden v. Burrell*² raises this somewhat curious point, and the decision must be of considerable persuasive authority. The pursuers were J. and C. van t'Hoff, residing and carrying on business in Rotterdam, and presumably Dutch subjects. The defender was a Glasgow shipowner, and the dispute arose out of a chartering transaction of 1907. J. and C. van t'Hoff were also individually interested in two firms carrying on business respectively at Duisberg, registered under German law, and at Antwerp, registered under Belgian law. These two firms were independent of the Rotterdam firm, and were in no way concerned with the subject-matter of the action. J. and C. van t'Hoff were individually interested in each of the firms as partners, but in each case there were other partners. In these circumstances it was held by the First Division of the Court of Session that the pursuers, by reason of their individual interests in the firm carrying on business at Duisberg, were alien enemies in the sense of the Trading with the Enemy Act, 1914, and relative Proclamations, and their action—instituted before the war—was stayed until after the termination of the war.³

A defendant enemy national resident in Vienna, at the time of action brought and when last heard of, is unable to take third-party pro-

¹ [1918] W.N. 16.

² [1916] S.C. 391, from which it appears that the plea of alien enemy was recognized in Scotland as long ago as 1664.

³ See also below, p. 68.

ceedings, for in so doing he is an actor, and comes under the procedural disability of the alien enemy plaintiff.¹

(g) *Non-enemy in enemy territory.* *Prima facie* the fact of a non-enemy person being present in, or carrying on business in, enemy territory will invest him with enemy character and prevent him from suing in an English Court. Thus in *McConnell v. Hector*,² where the Court of Common Pleas declined to support a commission of bankruptcy granted at the suit of three partners, all British subjects, of whom two resided and traded at an enemy port,³ Lord Alvanley C.J. said of them 'there is an hostile adherence and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of an hostile State, and who is so far a merchant settled in that State that his goods would be liable to confiscation in a court of prize,⁴ is yet to be considered as entitled to sue as an English subject in an English court of justice.'

This decision was approved by members both of the majority and the minority of the House of Lords in *Rodriguez v. Speyer Brothers*,⁵ and Lord Finlay L.C. said of it:⁶ 'All that was decided by the Court was that enemy character results from residence in the enemy country, and there is no doubt as to the correctness of this proposition.'

If, however, the presence of the British subject in the enemy country has been authorized by the Crown, either expressly or by implication as an incident to the carrying on there of a trade licensed by the Crown, the disability to sue does not attach to him.⁷

The same principles apply to the nationals of foreign non-enemy States in enemy territory.⁸

In *Porter v. Freudenberg*⁹ we are told by the Court of Appeal that 'for the purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily¹⁰ resident or who is carrying

¹ *Halsey v. Lowenfeld* (*Leigh and Curzon, Third Parties*) [1916] 2 K.B. 707 (C.A.).

² (1802) 3 Bos. & P. 113, 114. And see *Roberts v. Hardy* (1815) 3 M. & S. 533, and Lord Atkinson's comment upon it, [1919] A.C. at p. 97, and *O'Mealey v. Wilson* (1808) 1 Camp. 482, 483, where Lord Ellenborough C.J. said: 'If a British subject resides in an enemy's country without being detained as a prisoner of war, he is precluded from suing here.'

³ Flushing, described as 'a port belonging to the enemies of this country'; the relevant date is not given but was probably during the period when Holland under a Francophile puppet government was at war with Great Britain.

⁴ For instance, *The Harmony* (1800) 2 C. Rob. 322; *The Citto* (1800) 3 C. Rob. 38.

⁵ [1919] A.C. 59. ⁶ At p. 73. ⁷ *Ex p. Baglehole* (1812) 18 Ves. Jun. 524.

⁸ *Albrecht v. Sussmann* (1813) 2 V. & B. 323. ⁹ [1915] 1 K.B. 857, 869.

¹⁰ But even if he is present in enemy territory against his will, he is exposed to enemy pressure, and a judgment obtained by him might work a benefit to the enemy. (See the *Sovfracht* case [1943] A.C. 203, 212.)

on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory.

What amounts to voluntary residence? Clearly internment as a civilian or detention as a prisoner of war¹ in an enemy country does not. But in the case of *Scotland v. South African Territories, Ltd.*² Darling J. regarded as 'voluntary residence' a certain measure of detention in enemy territory not amounting to complete captivity. The plaintiff was the defendant company's manager in German South-West Africa upon the outbreak of war, and, though subject to a measure of internment, and presumably unable to leave the country, he was able to protect the defendant company's interests and preserve their business. Darling J. held that the plaintiff was an alien enemy during his residence in German South-West Africa and could not recover his salary in respect of that period. In *Baumfelder v. Secretary of State for Canada*³ the Exchequer Court of Canada held that a German national who, after being permanently resident in England, was interned and in 1919 was deported to Germany, and through poverty remained there until 1922 when he went to Canada, had not 'resided' in Germany within the meaning of the Canadian Treaty of Peace (Germany) Order, 1920, section 32 (a), because the conception of 'residence' implies voluntary presence within the territory of the State in question. But it must be noted that the question was not one of procedural status but one of the divesting of property under the Peace Treaty.

(h) *Non-enemy in enemy-occupied territory.*⁴ The position of a non-enemy national, whether British or the subject of an allied or a neutral State, who is present in or carrying on business in non-enemy territory which is invaded and occupied⁵ by the enemy requires particular consideration. The occupied territory may be British, e.g. the Channel Islands, or allied, e.g. Dutch (though when invaded, Holland was neutral), or e.g. Denmark. The common law position did not call for much consideration during the War of 1914 to 1918,⁶ and until recently

¹ *Vandyke v. Adams* [1942] Ch. 155, where it was held that a British prisoner of war in Germany is not an 'individual resident in enemy territory' and thus an 'enemy' under section 2 (1) (b) of the Trading with the Enemy Act, 1939.

² (1917) 33 T.L.R. 255.

³ *Canada Law Reports* [1927] Exch. p. 86; *Annual Digest*, 1927-1928, Case No. 372; and see *In re Otto Cloos and Chota Nagpur Co-operative Society* (1924), *Décisions des Tribunaux arbitraux mixtes*, IV, p. 13.

⁴ See also chapters 17 and 18: 'Effects of Belligerent Occupation of Territory'.

⁵ But not annexed in such circumstances that international law would regard the annexation as valid.

⁶ See Younger J. and Lord Cozens Hardy M.R. in *Soc. Anon. Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency* [1915] 2 Ch. 409, 414, 419, and Russell J. in *Re Deutsche Bank (London Agency)* [1921] 2 Ch. 291, 295.

the available authority was slender. The House of Lords has now, however, held in *V/O Sovfracht v. N.V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*¹ that a company incorporated under the laws of Holland, having its principal place of business at Rotterdam, and carrying on business in Holland before and after its occupation by Germany, was an alien enemy at common law so as to become incapable of suing as a plaintiff or other actor in an English Court.

The importance of this decision in view of the recent condition of Europe is very great. Its *ratio* covers the nationals of the country occupied and the nationals, caught therein, of the other countries which were enemy to Germany, including Great Britain; for instance, Dutch in Holland, British and Poles in France. It must not be assumed that it covers a Swedish national in Holland or a citizen of the United States of America who remained in France from June 1940 until his country became enemy to Germany in December 1941; it may be necessary in such cases to inquire whether the plaintiff could have left the occupied territory, and, if so, why he did not.² It is believed that in practice British and neutral nationals in enemy-occupied territory who had interests to protect in the United Kingdom, were helped by the grant from the Crown of licences to sue.³

(i) *Enemy prisoners of war, and enemies interned in British territory or repatriated.* During the War of 1939 to 1945 there were large numbers of persons of enemy nationality in the United Kingdom who were, to use a non-committal term, in custody and not at large. Some of them were prisoners of war, and the word 'internment' is not appropriate to their condition. This word is ambiguous. It may refer to the condition of members of British armed forces who, having sought refuge in or been driven by the exigencies of battle into the territory of a neutral country, have been 'interned' there by the neutral Government in accordance with international law. With these we are not concerned. It may and more frequently does refer to the condition

¹ [1943] A.C. 203; see also, later in this volume, pp. 313-318 (solicitor's retainer) and pp. 325-328 (the conditions and general effects of belligerent occupation). The House of Lords reversed the Court of Appeal [1942] 1 K.B. 222 on the common law point; as to the position of the Dutch company under the Trading with the Enemy Act, 1939, see below, p. 68. See also *H. P. Drewry S.A.R.L. v. Onassis* [1942] 71 Ll. L. Rep. 179 (C.A.), arising out of the occupation of France, which must now be read in the light of the *Sovfracht* decision, and its American sequel between the same parties in *Annual Digest*, 1941-1942, Case No. 149, and *Owners of M.V. Lubrafal v. Owners of S.S. Pamia* [1943] 1 All E.R. 269; and see *Chemacid, S.A. v. Ferrotar* (1943) in a U.S. District Court 51 F. Supp. 756.

² See *The Anglo-Mexican* [1918] A.C. 422, 425.

³ As to persons detained in enemy territory, see the Limitations (Enemies and War Prisoners) Act, 1945, below, p. 81 and p. 448.

of those persons, of whatever nationality, whom, being found in this country in time of war or upon the eve of war, the British Government has placed under arrest in the interest of public safety, or, sometimes, of their own safety. With such of these persons as are of enemy nationality we are concerned.

Accordingly we shall deal with

- (i) Enemy prisoners of war *stricto sensu*;¹
- (ii) Enemy civilians detained by the Crown, or, to use a more popular word, interned;²
- (iii) Repatriation.

We are primarily concerned with procedural status, but we shall find it convenient at the same time to consider their substantive rights and liabilities. It is true that persons in class (ii) were, at the time when they were detained, for the most part residing or present in this country with the implied licence of the Crown, and were thus here *per licentiam et sub protectione regis*, whereas persons in class (i) were taken in arms against His Majesty, but that difference is not reflected in their status.

(i) *Enemy prisoners of war stricto sensu*.³ Such a person has full civil capacity, i.e. as to contracting, marrying, acquiring and disposing of real and personal property *inter vivos* and by will, full procedural capacity (except as to the writ of *habeas corpus* to be mentioned later), and full liability to be sued in a civil action or prosecuted for a crime. He may bring an action for libel to defend himself against a charge of having committed a war atrocity; if he is allowed by the British Government to enter into a contract of service with a farmer, he may recover wages and he may sue for damages for an injury resulting from the negligence of his employer.⁴

At first sight this statement may seem surprising, but its content seems to us to follow logically from the fact that a prisoner of war is

¹ A British prisoner of war in enemy territory is not an 'individual resident in enemy territory' and so an 'enemy' within the meaning of the Trading with the Enemy Act, 1939; *Vandyke v. Adams* [1942] Ch. 155.

² On the more general and political aspects of the internment of alien enemies during the present war, see Cohn in 4 *Modern Law Review* (1941), pp. 200-209. On the meaning of the expression 'captured or interned by the enemy' occurring in the Military Service Act, 1916, section 8, see *King v. Burnham* (1918) 119 L.T. 308.

³ It is necessary to bear in mind the provisions of the International Convention of July 27, 1929, Treaty Series No. 37 (1931), relative to the Treatment of Prisoners of War and of any earlier Convention which may have been ratified by Great Britain and by the enemy Power; see in particular Articles 82 and 89 of the Convention of 1929.

⁴ It does not follow that he will receive the facilities required to enable him to attend in Court.

not *exlex*; he is 'in the King's peace'; he is living *sub protectione regis*, just as any ordinary resident is. The cases are not numerous, but it is suggested that they are adequate.

In *Sparenburgh v. Bannatyne*¹ the plaintiff—the subject of a neutral State, captured on board an enemy ship of war—entered into a contract with the defendant at St Helena, with the consent of the officer commanding that island, to serve as a seaman on a voyage to London. On arrival in London he was taken into custody as a prisoner of war, brought an action to recover his wages, and was met by the plea of alien enemy. The Court of Common Pleas (Eyre C.J., Heath and Rooke JJ.) gave judgment in his favour, the first mainly on the ground that, being originally a neutral subject, his hostile character was temporary and ceased when he was captured, but the last two have a good deal to say about the status of a prisoner of war. Heath J. says (p. 171): 'Officers on their parole must subsist like other men of their own rank; but according to such doctrine' (urged by the defendant) 'they must starve; for they could gain no credit if deprived of the power of suing for their own debts.' Later he says: 'If a prisoner of war is in confinement, he is protected as to his person; if he is on his parole, he requires further protection than what relates merely to his person.' He then cites a case of one Mississippi Law 'to show that a prisoner at (*sic*) war may sue and be sued', and later says: 'If a prisoner of war can be sued, there is no reason why he should not sue.' Rooke J. prefers to take his stand upon the reasons given by Eyre C.J., but adds (at p. 171): 'An enemy under the King's protection may sue and be sued: that cannot be doubted. A prisoner at war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action.' He then puts the case of an officer on parole who raises money by pledging a jewel and is then defrauded by the pledgee.²

In *Schaffenius v. Goldberg*³ Younger J., Lord Cozens-Hardy M.R., and Warrington L.J. all accepted the decision in *Sparenburgh v. Bannatyne*.

¹ (1797) 1 Bos. & P. 163. (The reference to the first hearing before Eyre C.J. alone is 2 Esp. 581.) Note also the remarks of Heath J. (at p. 170) upon crimes: 'a prisoner of war is not adhering to the King's enemies, for he is here under the protection of the King. If he conspires against the life of the King, it is high treason' (an instance of the conviction of a French prisoner for larceny is given); 'if he is killed, it is murder; he does not therefore stand in the same position as when in a state of actual hostility'.

² See also *Maria v. Hall* (1800) 2 Bos. & P. 236. A better report of the case is to be found attached to the report of *R. v. Depardo* (1807) 1 Taunt. 26, 28, from which it appears that in *Maria v. Hall* the Court of Common Pleas was divided on the question whether the plaintiff, a prisoner of war, who worked a ship home to this country, could recover on a contract for wages.

³ [1916] 1 K.B. 284 (C.A.).

The exception to his procedural capacity is that he is not entitled to a writ of *habeas corpus*. In *R. v. Schiever*¹ the writ was denied to the subject of a neutral State captured upon an enemy ship and then held as a prisoner of war, though he contended that he had been forced to serve on the enemy ship. To the same effect is the case of the *Three Spanish Sailors*,² who in 1779 moved for a writ against the commander of a sloop of war on the ground that they were unlawfully detained as prisoners of war. The Court of Common Pleas (Gould, Blackstone and Nares JJ.) in refusing the writ said:

'these men, upon their own shewing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a *habeas corpus*.'

The reason given is too wide, and, as *Sparenburg v. Bannatyne* shews, is incorrect. In *R. v. Vine Street Police Station Superintendent, ex parte Liebmann*,³ these three decisions were accepted as 'settled law' by a Divisional Court consisting of Bailhache and Low JJ. Probably the true explanation is that the Crown in making a man a prisoner of war is acting under the royal prerogative (under which it wages war) and that its act, like certain other acts as a belligerent, is not examinable by the Courts; in other words, that this act by the Crown belongs to the group of acts sometimes referred to as 'acts of State'.⁴ We can see no reason why a prisoner of war should not be entitled to a *habeas corpus* in respect of the detention of some person in whom he had an interest, such as a wife or child, in the same circumstances as anyone else would be,⁵ or in respect of his own detention by a private person acting without the authority of the Crown.⁶

¹ (1759) 2 Burr. 765.

² (1779) 2 W. Black. 1324.

³ [1916] 1 K.B. 268. See below, p. 59.

⁴ *Cook v. Sprigg* [1899] A.C. 572; *West Rand Central Gold Mining Co. v. The King* [1905] 2 K.B. 391.

⁵ In *Furly v. Newnham* (1780) 2 Doug. 419, the Court of King's Bench declined to grant a writ of *habeas corpus ad testificandum* in the case of a prisoner of war, Lord Mansfield saying that the proper course in such a case was to obtain 'an order from the Secretary of State'. The prisoner of war was not the applicant but one whom the applicant wished to call as a witness in an insurance case. This suggests that the reason why the writ of *habeas corpus* is not available in the case of prisoners of war has nothing to do with the demerits of the prisoner of war but is to be found in some peculiar character of the function being exercised by the Crown when waging war and incidentally capturing enemy persons and holding them in captivity; see *Rex v. Bottrill, ex parte Keuchenmeister* [1946] 1 K.B. 41. In *R. v. De Manneville* (1804) 5 East 221 an alien enemy domiciled in England, answering to a writ of *habeas corpus*, was allowed to retain custody of his child of tender age as against the mother; but there is no indication that he was a prisoner of war or interned.

⁶ See [1946] 1 K.B. at p. 54.

(ii) *Internment*. We now come to enemy civilians.¹ They are residing here permanently or temporarily *per licentiam et sub protectione regis*, and *prima facie* they are entitled to the benefit of the rule laid down in *Wells v. Williams*.² Does their internment disentitle them? In that case Chief Justice Treby said: 'Though the plaintiff came here since the war, yet if he has continued here by the King's leave and protection ever since, *without molesting the Government or being molested by it*,³ he may be allowed to sue, for that is consequent to his being in protection.' The expression in italics was considered by Younger J. and by the Court of Appeal in *Schaffenius v. Goldberg*,⁴ and it was held that at any rate internment 'as a mere measure of police' did not amount to the molestation which would destroy the right to sue.

The plaintiff in *Schaffenius v. Goldberg*, an enemy national resident and carrying on business in England and duly registered under the Aliens Restriction Order, 1914, but not interned, entered into a contract with the defendant in March 1915, for the manufacture of goods, and advanced money to him. In July 1915, the plaintiff was interned, and the defendant refused to have any further dealings with him on the ground that he was an enemy. It was contended for the defendant that internment operated as a revocation of the licence to remain in this country, which, as appears from the *Princess Thurn and Taxis* case and the old cases on which it rests, is essential to the right of the enemy to sue. Younger J., however, refused to hold that internment made the plaintiff *exlex*⁵ and decided that the contract was not affected by the plaintiff's internment, and that he was entitled to maintain any action competent to him in respect thereof. This decision was upheld by the Court of Appeal. This seems to follow logically from the fact that the plaintiff was for some months allowed to remain at large and to continue his business. As Coke said:⁶ 'for an alien (i.e. that is in league) may trade and traffique, buy and sell, and therefore of necessity he must

¹ It is true that many of them may be actual or reservist members of the enemy's armed forces, but it is unnecessary to explore the status of persons who may belong to both classes (i) and (ii) or fall between them, because the status of both classes appears to be the same.

² (1697) 1 Ld. Raym. 282, 283.

³ The expression which I have put into italics does not occur in the report in 1 Salk. 46.

⁴ [1916] 1 K.B. 284 (C.A.); followed by the Supreme Court of the United States of America in *Ex parte Kawato* (1942) 317 U.S. 69. For other instances of an internee as actor in proceedings, see *Kraus v. Kraus and Orbach* (1919) 35 T.L.R. 637, and (probably) *Uhlig v. Uhlig* (1916) 86 L.J.P. 90, and *Matthiesen v. Glas*, South African Law Reports (1940) Transvaal P.D. 147; *Annual Digest*, 1938-1940, Case No. 214 (note).

⁵ See Sir Frederick Pollock's note on this word [1916] 1 K.B. at p. 289.

⁶ Co. Litt. 129b.

be of ability to have personal actions.' In *Nordman v. Rayner*,¹ where the contract was entered into before the war, the plaintiff's internment only lasted a month, whereupon he was released, being found to be an Alsatian of French extraction and anti-German sympathies. The case is interesting upon the effect of the internment in rendering it difficult, if not impossible (as was alleged), to perform the contract, but adds nothing to *Schaffenus v. Goldberg* from the procedural point of view.

These are, however, both cases of 'innocent' internment. As Younger J. said in *Schaffenus's* case,² 'it is common knowledge amongst us that the internment of a civilian enemy does not necessarily connote any overt hostile attitude on his part'. Supposing, however, that he was imprisoned on account of some overt hostile act or some serious offence against the Defence Regulations, or interned upon some definite suspicion of a 'hostile attitude', might it not be said that he has forfeited the King's protection, which, as is stated in *Wells v. Williams*,³ lasts only while 'he has continued here... without molesting the Government or being molested by it'? 'Innocent' internment, as we have seen, does not amount to molestation by the Government, but it may fairly be argued that 'criminal' internment both constitutes molestation by, and results from molestation of, the Government. This point appears to be still open,⁴ and it will be noted that both in *Schaffenus's* and in *Nordman's* cases the innocent or colourless character of the internment as a mere act of general policy is insisted on. It is also probable that an alien enemy who assists the enemy and is either interned in consequence, or convicted of an offence and imprisoned, would lose his right to sue on the ground of adherence to the King's enemies.⁵ Provided, however, that the internment is 'innocent', an interned alien enemy retains his procedural status, and, we submit, the right of entering into contracts during internment. And there appears to be no reason why he should not sue in respect of a tort of which he may be the victim before or during internment. It may be mentioned incidentally that the enemy shipowner who was allowed to be a claimant in the Prize Court in *The Möwe*,⁶ was then interned.

¹ (1916) 33 T.L.R. 87.

² [1916] 1 K.B. at p. 295.

³ (1697) 1 Ld. Raym. 282, 283; 1 Salk. 46; 1 Lutw. 34.

⁴ See Lord Atkinson in *Johnstone v. Pedlar* [1921] 2 A.C. 262, 285.

⁵ See *Netherlands South Africa Railway Co. v. Fisher* (1901) 18 T.L.R. 116, where the plaintiff company, incorporated in Holland, a neutral State, and its directors, were trading with and obtaining money from the enemy Government during the war, and were found by the jury to be adhering to the King's enemies at the date of the issue of the writ.

⁶ [1915] P. 1, 4.

Although internment, or at any rate, 'innocent' internment, does not destroy the alien enemy's normal procedural capacity, there is one remedy previously referred to which is denied to an alien enemy when interned, namely, the writ of *habeas corpus*. In *Weber's* case,¹ an interned alien enemy applied for a writ of *habeas corpus*, and the argument turned on the question of nationality. The Divisional Court, the Court of Appeal, and the House of Lords held that Weber had not completely ceased to be of German nationality, and the writ was refused. The point that he was a prisoner of war, and for that reason not entitled to a writ of *habeas corpus*, was not taken. Meanwhile, in the course of *Weber's* litigation *Liebmann's* case was decided by a Divisional Court consisting of Bailhache and Low JJ.² Liebmann was served with a document entitled 'notice of intended internment of an alien enemy', informing him 'that it is intended to intern you as a prisoner of war'. He applied without success to the Home Office Advisory Committee, was interned, and now applied for a writ of *habeas corpus* on the ground (not material for present purposes) that by reason of his discharge from German nationality he was not an alien enemy, though admittedly not a British subject. The Crown took the preliminary objection that Liebmann was a prisoner of war, and therefore the Court had no jurisdiction to grant a writ of *habeas corpus* to him, and upon the authority of the case of the *Three Spanish Sailors*, previously discussed, and two other cases, the objection was upheld. The reasoning by which this result was reached is obscure. It is not denied that an alien enemy at large is entitled to a writ of *habeas corpus*, but once interned, it is argued, he becomes a prisoner of war and disentitled to the writ.³ Internment, however, was the very act for which redress was claimed, and the legality of which was challenged. The Crown, therefore, by doing the act which came into question *ipso facto* put that act out of question. At first sight the reasoning underlying the judgment on this point looks uncommonly like a *petitio principii*. The Aliens Restriction Act, 1914, and Orders thereunder, contained no express power to intern and, in the event of the failure of the preliminary objection, the Crown was thrown back upon common law prerogative. There can be little doubt that the true explanation⁴ is that the Crown in imprisoning

¹ [1916] 1 K.B. 280n.; [1916] 1 A.C. 421. See above, pp. 29-31. See also *R. v. Commandant of Knockaloe Camp, ex parte Forman* (1917) 34 T.L.R. 4 and *Rex v. Home Secretary, ex parte L.* [1945] K.B. 7, and p. 32 above, and note in 61 L.Q.R. (1945), p. 126.

² [1916] 1 K.B. 268; approved by the C.A. in *Rex v. Bottrill, ex parte Keuchenmeister* [1947] 1 K.B. 41; see Tucker L.J. at p. 54 as to *Liebmann's* case.

³ See Viscount Reading C.J. in *Freyberger's* case [1917] 2 K.B. 129, 133.

⁴ Above, p. 56.

an alien enemy for reasons of security, whether he becomes a prisoner of war or not, is acting under the royal prerogative, and that its act, like certain other acts done as a belligerent, is not examinable in the Courts.¹

(iii) *Repatriation*. What is the effect of repatriation upon procedural capacity?

In *Tingley v. Müller*² the defendant Müller, an alien enemy resident in London, not interned, but not allowed to move beyond a certain radius without a permit, gave to his solicitor on May 20, 1915,³ a power of attorney to sell certain leasehold premises. On May 26, having obtained a police permit to travel to Tilbury with the object of embarking for Germany by way of Flushing, he started upon that journey. On June 2 the leasehold premises were sold by public auction to the plaintiff, and an agreement was signed. From letters from the defendant to his solicitor it was inferred that on June 11 he had reached Hamburg. The case was argued before a full Court of Appeal, which, reversing Eve J. on this point, held that the proper inference was that on June 2 (the material date) the defendant had reached and was resident in Germany (although many Germans in course of repatriation are believed to have found more pressing business in Holland), and was therefore an alien enemy. The Court further held that the power of attorney, being expressed to be irrevocable for twelve months, and having been given at a time when the donor was not an alien enemy, was not avoided by his subsequent change of status; and that the agreement of sale did not involve any intercourse with the defendant, and could therefore be legally carried out by the attorney, so that the plaintiff's qualms of conscience were ill-founded, and his claim for a declaration that the agreement was void *ab initio* or dissolved by the defendant's change of status was refused. Scrutton L.J., however, delivered a strong dissenting judgment, holding that the agreement of June 2 was one which purported to be made with an alien enemy and was therefore void, and the interposition of an English agent did not cure the defect. He expressed the opinion that Müller became an alien enemy the

¹ *Rex v. Bottrill*, *supra*. Deportation is a similar act: *Netz v. Ede* [1946] Ch. 224.

² [1917] 2 Ch. 144 (C.A.). It should be noted that in this case, as in other cases of so-called 'repatriation', the enemy national could have stayed in the neutral country through which he had to pass, so far as Great Britain was concerned, though he might not have been allowed by the Government of that country to do so. Another consequence of repatriation is illustrated by *Stoeck v. Public Trustee* [1921] 2 Ch. 67, 71. It is evident from some of the speeches delivered in the *Sovfracht* case that the majority decision of the C.A. in *Tingley v. Müller* is not popular in the House of Lords.

³ It was common ground that he was then within the protection of the King.

moment he left England, as at that time he lost his acquired English commercial domicile, and thereupon reverted to his national character, determined by allegiance. *Uhlig v. Uhlig*¹ is a case of a summons by a petitioner of German nationality who in 1916 had obtained a decree absolute of divorce, asking for the custody and education of his children. He had already been repatriated to Germany. Neither on this ground nor on the ground that his repatriation had revoked his solicitor's retainer did the Court of Appeal decline to entertain the summons, but it must be noted that in proceedings of this character the primary concern of the Court is to secure the welfare of the children and not to protect the interests of the parties. The Court declined to allow the children, who were British subjects, to be sent to an enemy country.

(j) *Enemy (wherever he may be) by reason of identification with the enemy Power, either by adherence to it or by control from enemy sources.* This is a miscellaneous category, but the authority for its existence, though scattered and piecemeal, is, it is submitted, adequate.

(i) Thus it is believed that persons, of whatever nationality and wherever they may be, who are in the military or civilian employment of the enemy would be debarred from suing in an English Court. In *Sparenburgh v. Bannatyne*,² the plaintiff, who was a neutral (German) subject and was captured as a seaman on board a Dutch enemy ship of war, was regarded as an enemy until he had ceased to be in the service of the enemy, and was thereafter allowed to sue, though a prisoner of war. In *The Benjamin Franklin*,³ the plaintiff was a British pilot suing to recover wages for navigating a neutral ship to an enemy port. Lord Stowell dismissed the action, observing:

'I should first wish to hear how any suit can be maintained, on behalf of a British subject, for services performed in aiding the commerce and importation of the enemy. Is it not a contribution of his skill and experience to assist and promote the navigation of the enemy's ports?'

It is not clear whether this should be regarded as a case of adherence to the enemy causing a procedural disability, or a case of trading with the enemy resulting in an illegal agreement.

(ii) In *Netherlands South African Railway Co. v. Fisher*⁴ (which is not adequately reported) Lawrance J. left it to the jury to find that

¹ (1916) 86 L.J.P. 90.

² (1797) 1 Bos. & P. 163.

³ (1806) 6 C. Rob. 350.

⁴ (1901) 18 T.L.R. 116. For some account of the activities of this company see Pitt Cobbett, *Leading Cases and Opinions on International Law* (5th ed.), ii, p. 306.

the plaintiff company, incorporated in a neutral country (Holland), and its directors, also plaintiffs but apparently not enemy subjects,¹ had 'adhered to the King's enemies' by trading with and obtaining money from the enemy Government, with the result that they were debarred from suing for libel in an English Court. Lord Parker in the *Daimler* case² refers to this decision with approval. The acquisition of enemy character by a natural person by virtue of aiding the enemy or voluntarily residing in enemy territory is one of his main arguments for investing artificial persons with analogous enemy character, and when he says³ that a company incorporated in the United Kingdom may 'assume an enemy character... if its agents or the persons in de facto control of its affairs, whether authorized or not, are resident in an enemy country or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies', the statement applies *a fortiori* to a plaintiff, a natural person, who is adhering to the enemy Power or is under the control of alien enemies in the territorial sense. Thus if an enemy spy or agent in this country is injured owing to my grave negligence in driving my car, he cannot, it is submitted, sue me for damages during the war. The Trading with the Enemy Act, 1939, adopts (subsection 1 of section 2)⁴ the test of control in the case of 'any body of persons (whether corporate or unincorporate)', but we submit that this in no way excludes the common law test as applied to an individual.

(iii) In the *Daimler* case⁵ Lord Parker said:

'A natural person, though an English-born subject of His Majesty, may bear an enemy character and be under liability and disability as such by adhering to His Majesty's enemies. If he gives them active aid, he is a traitor; but he may fall far short of that and still be invested with enemy character... Not only actively, but passively, he may bring himself under the same disability. Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes....'

Lord Parker does not confine this statement to British subjects in enemy territory, and we can see no reason why any person in this country, of whatever or no nationality, who adheres to His Majesty's enemies by overt acts should not thereby invest himself with enemy character

¹ It seems that one of them was at the material time resident in enemy territory.

² [1916] 2 A.C. 307, 339.

³ At p. 345.

⁴ For the purposes of the Act, see later, p. 68.

⁵ [1916] 2 A.C. 307, 338. Note the different case of the alien in this country in time of peace who is guilty of active hostility to the Crown, discussed *obiter* in *Johnstone v. Pedlar* [1921] 2 A.C. 262, 273-275, 277, 285, 297.

and come under the disabilities appropriate to the enemy in the territorial sense.¹

(k) *Enemy corporations.* A corporation is regarded as enemy for the purpose of being defeated as a plaintiff by the plea of alien enemy in the following circumstances:

(i) *When it owes its legal existence and incorporation to the laws of an enemy State.* It is believed that there is, strictly speaking, only *obiter* English authority for this proposition, though there cannot be serious doubt upon it. Of American law Beale² asserts the proposition on the strength of *Society for the Propagation of the Gospel v. Wheeler*.³ In what was the leading English decision before the War of 1914 to 1918—*Janson v. Driefontein Consolidated Mines*⁴—five law lords (Lord Halsbury L.C. at p. 490, Lord Macnaghten at p. 497, Lord Davey at p. 498, Lord Brampton at p. 501, and Lord Lindley at p. 505) were of the same opinion. But it was not essential to the decision.⁵ A corporation incorporated in a foreign State may in addition acquire for other reasons some other and additional national character, but we suggest that there is an irrefutable presumption that at any rate the nationality of the State which brought it into being must be attributed to it.

(ii) *When, wherever incorporated, it has acquired enemy character by reason of the hostile residence or activities of its agents or other persons in de facto control of its activities.* This proposition rests upon the speech of Lord Parker in the *Daimler* case—*obiter*,⁶ but surely no *obiter* judgment more deliberate and more closely approximating to binding law has ever been delivered. This speech, delivered with the concurrence of Viscount Mersey, Lord Kinnear and Lord Sumner, shews that a test based on the country in which and under whose laws a company is incorporated is only a *prima facie* test and will give way⁷ to the test of the national status and character of its agents or the persons who are

¹ Macgillivray, *Insurance Law* (2nd ed. 1937), p. 274, suggests (rightly, I think) that mere trading with the enemy by a person in this country, though rendering the actual transaction illegal and void, does not invest him with a general legal disability. It might depend on the volume and the character of the trading.

² *Conflict of Laws*, § 153. 3.

³ (1814) 2 Gall. 105; see also for English authority *Daniel v. Commissioners for Claims on France* (1825) 2 Knapp 23, and *Long v. The Same* (1832) *ibid.* 51, which, however, involve other points.

⁴ [1902] A.C. 484.

⁵ Per Lord Parker in *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A.C. 307 (foot of p. 342).

⁶ It sufficed for the purposes of the decision to hold, as their lordships unanimously did, that the secretary in England held no authority from the directors, who were German nationals resident in Germany, to institute the action and that there was no way in which after the outbreak of war he could acquire such authority.

⁷ To the detriment, not to the benefit, of the company.

in *de facto* control of its affairs; and that the national status and character of the individual shareholders, while not in themselves affecting the character of the company, are relevant to

'the question whether the company's agents, or the persons in *de facto* control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies.'¹

So in a case (such as that under consideration) where the secretary held one share out of 25,000, and was the only shareholder and the only officer of the company who was not an enemy, the burden of proving that it was not an enemy as tested in the manner above indicated might well be thrown upon the company, and an investigation by the Court of first instance would be required. One of the strongest points in Lord Parker's argument is made, it is submitted, when he shews that the nationality of a natural person is by no means conclusive in determining his character, enemy or otherwise, and that just as voluntary residence or a commercial domicile in enemy territory or adhering to the enemy will invest a natural person with enemy character though he be not of enemy nationality,² so

'in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at.'³

Lord Parker summarized his speech in six propositions⁴ of which we shall quote the third and the sixth. The third is:

'Such a company may...assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy⁵ or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.'

This proposition has been adopted in a number of cases, and it may now safely be regarded as part of the law of England.⁶

¹ [1916] 2 A.C. at p. 345. For some French decisions on enemy control, see *Annual Digest*, 1938-1940, Case No. 213.

² See above, p. 61.

³ [1916] 2 A.C. at p. 339.

⁴ [1916] 2 A.C. at p. 344.

⁵ E.g. *Netherlands South Africa Railway Co. v. Fisher* discussed above on pp. 58, 61, 62. For a South African decision, see *Overseas Trust Corporation v. Godfrey*, S.A.L.R. [1940] C.P.D. 177; *Annual Digest*, 1938-1940, Case No. 214.

⁶ And see article by the present writer in *British Year Book of International Law*, 1923-1924, p. 44. In *Part Cargo ex M.V. Glenroy* [1945] A.C. 124 the Daimler doctrine operated to make a German enemy company controlled by a (then neutral) Japanese company an enemy house of business of the Japanese company.

(iii) In the words of Lord Parker's sixth proposition: 'A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.'¹

The Trading with the Enemy Act, 1939, section 2 (1), as amended, includes 'for the purposes of this Act'² within its definition of 'enemy':

'(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,

(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty, and

(e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business.'

(l) *Plaintiff in interpleader issue.* In *Geiringer v. Swiss Bank Corporation*,³ it was held by Bennett J. that the claimant in an interpleader issue directed to be tried before the outbreak of war, who becomes an alien enemy in the territorial sense, cannot proceed with his claim after war has broken out, though, if the issue had been framed so as to make him the defendant, the proceedings could have continued; but an order made during the war directing the plaintiff in the issue to give security for costs (which clearly he could not do) or, alternatively, to be forever barred from prosecuting his claim, while leaving the defendant in the issue free to recover the sum claimed from the party who interpleaded, would be manifestly unjust because the alien enemy plaintiff in the issue might be the party lawfully entitled to payment of the sum in dispute. Accordingly, the learned judge declined to make such an order.

(m) *Claimant in Prize Court proceedings.* The practice governing enemy claimants in Prize Courts up to the year 1940 has been admirably stated by Dr Colombos in his *Law of Prize*⁴ (§§ 330 to 332 inclusive). Although it is the Crown which institutes proceedings for the condemnation of the property, there is no doubt that a party who enters

¹ At p. 346. But the mere fact that a British company had a rubber estate in enemy territory and was carrying on business there through a properly constituted agent up to the time of the outbreak of war does not make it an enemy company: *Re Hilckes, ex parte Muhesa Rubber Plantations* [1917] 1 K.B. 48 (C.A.).

² Upon the effect of this expression, see below, p. 68.

³ [1940] 1 All E.R. 406.

⁴ (2nd ed. 1940). See also *The Rebecca* (1804) 5 C. Rob. 102; *The Charlotte* (1813) 1 Dods. 212; *The Eliza Ann* (1813) 1 Dods. 244; *The Frederick* (1813) 1 Dods. 266; *The Maria Theresa* (1813) 1 Dods. 303.

appearance and claims the property is regarded as an *actor* in the proceedings.¹ At any rate, from *The Père Adam*² in 1778 until the outbreak of the War of 1914 to 1918, the enemy was not allowed to appear and claim his property unless he could point to some suspension of his hostile character. However, in *The Mōwe*³ in November, 1914, Sir Samuel Evans P., regarding the matter as one of practice and not of international law, directed that 'the practice of the Court shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court'. This practice was approved by the Privy Council in *The Vesta*⁴ and generalized so as to apply to any international instrument.⁵ In *The Glenroy*⁶ Lord Merriman P. declined to extend the practice to cover the case of the enemy claimant who can point to no convention or Royal authority enabling him to sustain a *persona standi in judicio* and held that a Royal licence to sue was necessary.⁷

(n) *The statutory enemy.* The Trading with the Enemy Act, 1939,⁸ does not specifically deal with procedural status, but 'enemy' is defined 'for the purposes of this Act' by the Act and the amending Defence Regulations. Section 2 of the Act, as amended by the Defence (Trading with the Enemy) Regulations, 1940, is as follows:

'(1) Subject to the provisions of this section, the expression "enemy" for the purposes of this Act means—

- (a) any State, or Sovereign of a State, at war with His Majesty,
- (b) any individual resident⁹ in enemy territory,
- (c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,

¹ *The Charlotte* (1813) 1 Dods. 212.

² Hay & Marriott 141.

³ [1915] P. 1, 15.

⁴ [1921] 1 A.C. 774, 786. There are other cases cited by Colombos, *op. cit.*, and see Hyde, ii, § 612, and Garner, *International Law and the World War*, § 90.

⁵ See Lord Parker in *The Hakan* [1918] A.C. 148, 150, and *The Dirigo*, *The Hallingdal and Other Ships* [1919] P. 204, 217, 219.

⁶ See *The Glenroy* [1943] P. 109.

⁷ See below, p. 189, for the conditions affecting enemy plaintiffs generally. But it would seem that in prize, although the executive discretion is equally unfettered, the conditions are not so strict as in the case of enemy plaintiffs generally; the Prize Court exists, for the purpose, amongst others, of dealing with enemy property, and accordingly licences are granted more freely for prize than for other proceedings.

⁸ The Schedule to this Act states the extent to which the Trading with the Enemy legislation of the War of 1914 to 1918 has been repealed. Note the proviso.

⁹ See *Stadt Müller v. Miller* (1926) 11 Federal Reporter (2nd) 732 (Cir. Ct. of App. 2nd Cir.) and *Annual Digest*, 1925-1926, Case No. 339; and *Vowinkel v. First Federal Trust Co.* (1926) 10 Federal Reporter (2nd) 19 (Cir. Ct. of App. 9th Cir.) and *Annual Digest*, 1925-1926, Case No. 352.

- (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty; and
- (e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business;

but does not include any individual by reason only that he is an enemy subject.

(2) The Board of Trade may by order direct that any person specified in the order shall, for the purposes of this Act, be deemed to be, while so specified, an enemy.'

To which it is necessary to add subsections (1) and (2) of section 15:

'(1) In this Act the following expressions have the meanings hereby respectively assigned to them:

"enemy subject"¹ means

- (a) an individual who, not being either a British subject or a British protected person, possesses the nationality of a State at war with His Majesty, or
- (b) a body of persons constituted or incorporated in, or under the laws of, any such State; and

"enemy territory" means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty.

(2) A certificate of a Secretary of State that any area is or was under the sovereignty of, or in the occupation of any Power, or as to the time at which any area became or ceased to be under such sovereignty or in such occupation shall, for the purposes of any proceedings under or arising out of this Act, be conclusive evidence of the facts stated in the certificate.'

and the later subsection (1A) (S.R. & O. 1940, No. 1914) empowering the Board of Trade by Order to assimilate to enemy territory for the purposes of this Act 'any area specified in the Order', as was done by a series of Trading with the Enemy (Specified Areas) Orders in the case of the (formerly) Unoccupied Zone of France, Algeria, French Morocco, Tunisia, Monaco, French Somaliland, Roumania, Bulgaria, Hungary, Finland, Greece, and Yugoslavia.

It is under subsection (2) of section 2 of this Act that the Board of Trade issued the 'Black Lists' containing hundreds of names of persons

¹ The Treachery Act, 1940, section 5 (1), defines an 'enemy alien' for the purposes of that Act as 'a person who possesses the nationality of a State at war with His Majesty, not being either a British subject or a person certified by a Secretary of State to be a British protected person'.

and firms and corporations carrying on business in neutral countries, closely following the practice of the War of 1914 to 1918. The Board of Trade has power to specify 'any person' as an enemy.

The Court of Appeal in the *Sovfracht* case¹ held that this Act 'does not purport to impose or define enemy status otherwise than for the purposes of the Act, which are (so far as relevant) the prohibition of dealings with persons who, for the purposes of the Act, are to be regarded as enemies', and that 'a person, therefore, who is not an enemy at common law is not by the Act made an enemy', that is to say, for procedural purposes, so as to be prevented from suing by the plea of alien enemy. The House of Lords held the Dutch company to be an enemy at common law and therefore found it unnecessary to give an express ruling upon the meaning of such expressions as 'for the purposes of this Act' and 'in this Act', but Lord Wright² approved the view of the Court of Appeal referred to above and added that the statutory and the common law definitions were substantially the same. (*Gebr. van Uden v. Burrell*, already discussed,³ was a decision upon the Trading with the Enemy Act, 1914, which resembles in many respects the Act of 1939 and contains the expression 'for the purposes of this Act'; there the purposes appear to have included the question of the plea of alien enemy.)⁴

In most cases a person who is an enemy in the territorial sense at common law is also a statutory enemy by reason of the Trading with the Enemy Act, 1939. The reverse is not true, for the Board of Trade has power under subsection 2 of section 2 of the Act to issue 'Black Lists' and specify 'any person' as an enemy,⁵ for instance, a Spaniard in Barcelona who had some commercial connexion with Germany. Thereupon it becomes criminal and illegal for any person in this country to have any intercourse or dealings with him, including the payment of money to him. Suppose that he becomes entitled to a legacy payable under a will proved in England out of assets situate in England, or is libelled by a person in England. Can he be defeated by the plea of alien enemy if he sues in England? Although procedural

¹ [1942] 1 K.B. 222, 229; [1943] A.C. 203; see above, p. 53.

² [1943] A.C. at p. 219.

³ P. 50.

⁴ For a Canadian illustration of an enemy national who was an enemy for the purpose of certain legislation but not an enemy at common law or for the purpose of other legislation so as to be defeated by the plea of alien enemy, see *J. G. White Engineering Corporation v. Canadian Car & Foundry Co.* [1940] 4 Dominion Law Reports 812: *Annual Digest*, 1938-1940, Case No. 207.

⁵ For instance, the Trading with the Enemy (Specified Persons) (Amendment) (No. 3) Order, 1943 (S.R. & O. 1943, No. 692), now revoked. Hundreds of persons, firms and corporations were so specified, following the practice of the War of 1914 to 1918.

status may not be one of 'the purposes of the Act', it is difficult to believe that the 'Black-Listed' statutory enemy could recover in an English Court money which it would be illegal for the defendant to pay him before action brought.

It is worth mentioning that in *The Hoop*¹ Lord Stowell attached so much importance to lack of *persona standi in iudicio* that he was prepared to infer from its absence 'a legal inability to contract'.

(o) *Suing by Royal licence*. See below, p. 189.

2. ENEMY DEFENDANTS

It is now clear that an enemy, wherever he may be and, if in this country, whether 'in protection' or not, can be made a defendant if service or substituted service can be effected, and is in the same position as any other defendant. Until the War of 1914 to 1918 English authority was scarce, and the Attorney-General's argument in *Porter v. Freudenberg*² turned largely on the position of felons, outlaws, and attainted persons as declared in a series of decisions which he cited. *Bacon's Abridgement* (7th ed.), vol. i, at p. 183, and *Albrecth v. Sussmann*,³ give some authority for saying that an alien enemy could bring a bill of discovery to assist him in his defence, and therefore that he could not repel an action by pleading that he was an alien enemy. A decision of the Supreme Court of the United States of America in 1870, *McVeigh v. United States*,⁴ afforded authority for the view that the alien enemy can be sued and can resort to the usual means of defence. Bailhache J. in *Robinson & Co. v. Continental Insurance Co. of Mannheim*⁵ pointed out that to allow an alien enemy defendant to set up such a plea was 'to injure a British subject and to favour an alien enemy, and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief.' He refused the defendant's application to stay all proceedings, fortifying his judgment by the passage from *Bacon's Abridgement* referred to above and by certain American decisions, and his judgment received the approval of the full Court of Appeal in *Porter v. Freudenberg*. Lord Reading C.J. in delivering the judgment of the Court said:

'As was said by Bailhache J. in *Robinson & Co. v. Continental Insurance Co. of Mannheim*, "to hold that a subject's right of suit is suspended

¹ (1799) 1 C. Rob. 196, 201.

² [1915] 1 K.B. 857 (C.A.).

³ (1813) 2 V. & B. 323.

⁴ 11 Wallace 259.

⁵ [1915] 1 K.B. 155, 159. On the effect of war upon the jurisdictional immunity of an enemy Government, see *Telkes v. Hungarian National Museum* in *Annual Digest*, 1941-1942, Case No. 169.

against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule". In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during the war from the discharge of his liabilities to British subjects.'

He then referred to certain old cases in which it had been held that persons attainted or outlawed could be sued, and pointed out (p. 883) that 'the real difficulty that arises in seeking to enforce a right against an alien enemy is that of fixing him with proper notice of the suit and the proceedings in the action'.

Substituted service. The usual way in which a plaintiff attempts to meet this difficulty is by some form of substituted service either of the writ or of notice of the writ, and the matter was discussed at some length by the Court of Appeal in *Porter v. Freudenberg*.¹ The Court has at all times a wide discretion as to the form of substituted service, if any, which it will authorize, within the limits of the principle stated in that decision to be that the Court must satisfy itself that²

'the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant'.

In that decision the Court authorized substituted service in one case upon the London agent of an enemy and in another case upon the London manager of the enemy's business, both enemies being in the enemy country.³

On December 17, 1940, the following notice was issued by the Lord Chief Justice:⁴

'As the Government of Germany has refused to serve and has returned notice of writs forwarded by the United States Embassy, recourse must be had to the ordinary practice of substituted service—which may be

¹ [1915] 1 K.B. 857, 886. For an instance of service on the London branch of a Berlin bank, see *Leader, Plunkett and Leader v. Direction der Disconto Gesellschaft* (1914) 31 T.L.R. 83. Later, the Legal Proceedings against Enemies Act, 1915, now repealed, facilitated service of proceedings instituted against enemies out of the jurisdiction in certain cases. There was no similar legislation during the recent war until the making of the rule of the Supreme Court mentioned on the next page.

² At p. 889.

³ For an instance of the effective service of a writ of summons upon the manager in London of a partnership carrying on business in enemy-occupied territory, see *Meyer v. Louis Dreyfus et Cie* [1940] 4 All E.R. 157, and comment upon that decision, below, at p. 186.

⁴ See Weekly Notes of December 21, 1940, p. 456.

by advertisement. Subject to the discretion of the Court or a Judge, proof of inability to effect personal service will be satisfied if the affidavit states that the proposed defendant is resident in Germany or in a Country occupied by Germany, and gives the grounds on which the deponent bases his statement.'

This notice was referred to by the Court of Appeal in the case described as *Re An Intended Action between V. L. Churchill & Co. and Johan Lomberg*,¹ where it was pointed out that the notice referred to above did not purport to modify the law as laid down in *Porter v. Freudenberg*, that service by advertisement was only one variety of substituted service, and that the notice did not mean that advertisement in, say, *The Times* of London must, in all circumstances, be regarded as sufficient to bring a writ of summons to the notice of a person in enemy or enemy-occupied territory. In that case the Court declined to authorize substituted service of a writ issued against a Danish subject resident in Copenhagen after the occupation of Denmark by the enemy by means of advertisement in a Swedish newspaper normally circulating in Denmark, because it was clear on the evidence that the German censorship authorities were making every effort to prevent advertisements of this kind from penetrating into Denmark, and it was therefore highly improbable that the advertisement would come to the notice of the defendant. Thus the test laid down in *Porter v. Freudenberg* was not satisfied.²

A rule of the Supreme Court, Order IX, r. 14B, which came into force on October 31, 1941, enabled the Court to 'dispense with service of a writ of summons or a notice of a writ of summons³ on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended by or under any enactment',⁴ in the circumstances and subject to the safeguards specified in the rule.

Enemy's right of effective defence. Having dealt with substituted service, the learned Lord Chief Justice, in *Porter v. Freudenberg*, continued:⁵

'Once the conclusion is reached that the alien can be sued, it follows that he can appear and be heard in his defence and may take all such

¹ [1941] 3 All E.R. 137; [1941] W.N. 195; referred to by Uthwatt J. in *Re de Barbe* [1941] W.N. 218.

² And see *Vandyke v. Adams* [1942] Ch. 155, and *Luccioni v. Luccioni* [1943] P. 49.

³ Not a petition in divorce proceedings: *Read v. Read* [1942] P. 87 (C.A.).

⁴ Which does not include a British officer captured by the enemy and a prisoner of war in enemy territory: *Vandyke v. Adams* (*supra*).

⁵ [1915] 1 K.B. at p. 883. For a case of adjournment until such time as an interned defendant could attend in Court, see *Munim v. Benz*, *Indian Law Reports*, Bombay Series (1941), Pt. XII, p. 648, and *Annual Digest*, 1941-1942, Case No. 141.

steps as may be deemed necessary for the proper presentment of his defence.... To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.'

Thus, the enemy defendant, whether the proceedings are instituted before or after the outbreak of war, is entitled to be represented by solicitor and counsel and to exercise all the ordinary privileges,¹ and be subject to all the ordinary liabilities, of a defendant, except that

(i) he cannot counterclaim, but may plead his claim *pro tanto* as a set-off;²

(ii) he cannot take third party proceedings, because in doing so he would become an *actor*;³ and

(iii) (probably) he cannot execute a judgment for costs during the war.⁴

(iv) During the Crimean War the Court of Common Pleas declined to grant the application of enemy defendants for a commission to examine witnesses in Russia on the ground that it would involve the sanctioning of 'an unlawful communication with the Queen's enemies'.⁵

The Courts (Emergency Powers) Act, 1939, contains no provisions resembling sub-section (7) of section 1 of the Courts (Emergency Powers) Act, 1914, which denied the benefits of that Act to 'the subject of a Sovereign or State at war with His Majesty', and no legislation resembling the Legal Proceedings against Enemies Act, 1915⁶

¹ Including the right to move for a stay of proceedings: *Owners of M.V. Lubrafol v. Owners of S.S. Pamia* [1943] 1 All E.R. 269.

² *Re Stahlwerk Becker A.-G.'s Patent* [1917] 2 Ch. 272, where it is made clear that an enemy patentee who is respondent to a petition for revocation of a patent (being in the position of a defendant—*Re Merten's Patents* [1915] 1 K.B. 857) may apply for leave to amend his specification by way of disclaimer, for in doing so he is not an *actor* in the proceedings but is resorting to a defensive procedure.

In *The Kaiser Wilhelm II* (1915) 31 T.L.R. 615 (damage by collision) it is not stated which shipowner initiated the proceedings and which was left to counterclaim or institute a cross action; at any rate in one of these proceedings an alien enemy was an *actor*; the ships being held to be equally to blame for the collision, it was ordered that no payment should be made under the judgment until the end of the war or the further order of the Court.

³ *Halsey and Another v. Lowenfeld (Leigh and Curzon, Third Parties)* [1916] 2 K.B. 707 (C.A.).

⁴ *Robinson & Co. v. Continental Insurance Co. of Mannheim* [1915] 1 K.B. 155, 162.

⁵ *Barrick v. Buba* (1855) 16 C.B. 492.

⁶ Under this Act the rules governing substituted or other service of a writ of summons or the substitution of notice for service and the rules of evidence could at the discretion of the Court be relaxed in favour of a British subject who would otherwise be inconvenienced or prejudiced by the absence of an enemy from the jurisdiction.

(which was repealed in 1927) was enacted until the making of Order IX, r. 14B, referred to above.

It follows from the alien enemy defendant's right to defend proceedings that his solicitor and counsel may by licence hold the intercourse with him required for obtaining instructions, and cases occurred in the War of 1914 to 1918 where consultation with him in a neutral country was permitted.¹

3. ENEMY APPELLANTS

Their position was considered by the Court of Appeal in *Porter v. Freudenberg*, where it was laid down² that the appellate Courts are as much open to the enemy defendant as to any other defendant; he may be said to initiate the appeal but he was not the *actor* in the original proceedings. 'Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant.' The decision of the Supreme Court of the United States in *McVeigh v. United States*³ was followed. On the other hand, the position of the enemy plaintiff is different. We have seen that he cannot during the war commence proceedings or continue proceedings initiated before the war. He is the *actor* throughout. Whether judgment has been pronounced against him before or during the war, he has no right of appeal during the war.

4. BANKRUPTCY

An enemy, whether 'in protection' or not, may be made bankrupt and may apply for and obtain his discharge.⁴ But he cannot petition, for then he would be an *actor*. Can he prove for a debt in a bankruptcy resulting from a petition filed by one who is not under such disability? There is some authority⁵ for saying that his proof ought to be considered during the war and that, if it is admitted, the sum due should be retained for him until after the war or paid during the war to a

¹ See Scrutton in 34 L.Q.R. (1918) at p. 124.

² [1915] 1 K.B. 857, 883, 884, 890; *A.-G. für Anilin Fabrikation and Another v. Levinstein* (1915) 84 L.J. Ch. 842. See also *The Charlotte* (1813) 1 Dods. 212.

³ 11 Wallace 259.

⁴ *Re Levy*, *The Times* newspaper, January 30, 1915, where the enemy was probably in this country, and it was held by Mr Registrar Brougham that 'a bankrupt, although an alien enemy, was entitled to defend himself against the pursuit of creditors and to apply for his discharge'.

⁵ *Ex parte Boussmaker* (1806) 13 Ves. 71; per Scrutton L.J. in *Re Hilckes, ex parte Muhesa Rubber Plantations* [1917] 1 K.B. 48, 60. But if the trustee in bankruptcy rejects or reduces his claim, he cannot take proceedings to challenge the trustee's decision, because in doing so he is an *actor*: *Re Wilson and Wilson, ex parte Marum* (1915) 84 L.J. K.B. 1893.

custodian of enemy property if one has been appointed. To proceed to distribute the bankrupt's assets without considering the enemy's proof would amount to distributing amongst the other creditors a sum which belongs to the enemy (unless and until it is confiscated by the Crown by the appropriate procedure).

5. STATUTES OF LIMITATION

The rules governing the limitation of actions—at any rate where no question of real property is involved—being part of the law of procedure, it is right that they should be considered here. It is useful to remind ourselves of the distinction between a secondary, remedial right such as a right of action and a primary right, the breach of which gives rise to a right of action; for instance, in the case of a pre-war contract, the distinction between a right of action which accrued before a war broke out and a right to performance which had not then become due. We are only concerned with rights of action; there are no statutes for the limitation of primary rights. The effect of the outbreak of war upon rights of performance must be considered elsewhere; that is not procedural but substantive law; at any rate statutes for the limitation of actions cannot touch them.

We shall discuss, first, the case where the alien enemy is a plaintiff or other *actor*, and, secondly, the case where he is a defendant or in the position of a defendant. We must remember that special treaty provisions may exclude the operation of the ordinary rules of law.

A. *Alien enemy plaintiff or other actor.*¹ The matter will be considered under the following headings: (i) in English law, (ii) in American law, (iii) under Peace Treaties, and (iv) conclusion.

(i) *English law.* The issue of a writ of summons or other initiation of legal proceedings stops the running of time, so that if an alien enemy *actor* has initiated proceedings before the outbreak of war, his action is not barred, however long the war may last; he has no complete assurance that his action may not be dismissed for want of prosecution, but the judgment of the Court of Appeal in *Porter v. Freudenberg* ought to give him some degree of confidence that he is not likely to meet with injustice. If he has not begun his proceedings before the outbreak of war, how does he stand?

We propose to examine the matter as it stood upon the outbreak of the recent war, September 3, 1939, and then consider whether

¹ Proceedings in Prize Courts are not governed by any statute of limitation: see Colombos, *Law of Prize* (2nd ed. 1940), § 343.

the Limitation Act, 1939, which came into force on July 1, 1940, has affected it.

Originally, both at common law and in equity, there was no limitation of proceedings. An action or a suit might be brought however long the period which had elapsed since it first became possible to do so. This state of affairs led to great inconvenience and injustice, and just as Roman law and the systems based upon it found it necessary to introduce and recognize the prescription of claims, our legal forefathers became conscious of the same necessity.¹ So far as common law actions were concerned, after some early statutes fixing a particular date (such as the coronation of Richard I in 1189 for the writ of right) as the earliest date of accrual of any enforceable cause of action, we adopted the more scientific system of different ambulatory statutory periods which began to run for each cause of action as and when it accrued. So far as equity was concerned, the matter lay in the hands of the Chancellor, who partly by means of the doctrine of laches and partly by following the analogy of statutes of limitation, was able to evolve certain workable rules.

It is important to note that limitation rests in common law actions upon statute and in equity upon the discretion of the Court evolved and controlled by a long series of precedents. That is only a general statement and there is a frontier area affected by both methods, but it is submitted that for the purposes of this argument the general statement is true. Therefore the burden of proof is on the person who asserts that an action is barred by lapse of time; it is for him to point to a statute or a well-established precedent which bars it. In attempting to do so it may be possible for him to shew that a statute prescribing certain facts which prevent time from running is intended to be exhaustive and to exclude any other facts which might be alleged to have that effect.

When we seek for actual English authority upon the effect of war, we find it to be practically *nil*²—an *obiter dictum* by Bramwell B.

¹ See Holdsworth, *History of English Law*, iii, pp. 8, 166. The following maxims reflect different aspects of the matter: *Expediit reipublicae ut sit finis litium: Vigilantibus et non dormientibus jura subveniunt*.

² In certain actions arising out of the events of the English Civil War and the Commonwealth, it was necessary for the Courts to consider whether a statutory period of limitation ran while 'the Courts were not open', and the decision was that this event—not being specifically excepted by the statute—did not prevent the period from running: *Prideaux v. Webber*, 1 Lev. 31; *Lee v. Rogers*, 1 Lev. 110; *Weller v. Prideux*, 1 Keb. 157; see also *Hall v. Wybourn*, 2 Salk. 420; *Aubry v. Fortescue*, 10 Mod. 205, and *Beckford v. Wade* (1805) 17 Ves. Jun. 87, 93; see comment by Clifford J. of the U.S. Supreme Court in *Hanger v. Abbott* (1867) 6 Wall. 532 and Hudson's *Cases on International Law* (2nd ed.) at p. 1319.

in *De Wahl v. Braune*,¹ where in the year 1856 the wife (apparently within the realm) of an enemy resident in Russia sought to sue in her own name upon a contract, urging that her husband was *civilliter mortuus* and was not allowed to sue:

'It may be that the effect [of judgment for the defendant] would ultimately be to bar the action, by reason of the Statute of Limitations, but the inconvenient operation of that statute is no answer and does not take the case out of the general rule.'

Professor C. N. Gregory, after examining the scanty English judicial authority, the numerous American decisions and text-books on International Law, concluded in 1914 as follows:

'It is submitted that the authorities seem to establish that the Statute of Limitations will not run,

(1) when the parties are so divided by the line of war that the plaintiff can not have any access to the Court,

(2) when the Court to which the plaintiff has a right to have recourse does not sit, on account of the disorder of war.'²

In the dearth of authority we suggest that *at common law* there is nothing to prevent an English Court from holding that the outbreak of war suspends the running, or the beginning of the running, of time, and that it ought so to hold.

Limitation Act, 1939. Does this Act change the situation? Although it did not come into operation until July 1, 1940, it applies, it is submitted, to rights of action which accrued before that date and which had not, so to speak, crystallized before that date by the issue of a writ or similar initiatory process. It extends the time in some cases and curtails it in others. The recent war began on September 3, 1939, so that many rights of action against alien enemies were in existence when the Act came into force. It is primarily a consolidating Act, but it is more comprehensive than the Acts which it repeals, and in section 31 (1) 'action' is defined as 'any proceeding in a court of law, including an ecclesiastical court'. This is apparently intended to include

¹ 25 L.J. Ex. 343, 345; 1 H. & N. 178; see also *Derry v. Duchess of Mazarine* (1697) 1 Ld. Raym. 147 (a very doubtful decision). The editor of Lord Lindley's *Law of Companies* (6th ed. 1902), p. 53, n. (g), appears to approve this *dictum*. Pollock, *Principles of Contract* (10th ed. 1936), p. 94 (n. (c)), disapproves of Lord Bramwell's surmise that the Statute runs during a war; so does Chadwick in 20 L.Q.R. (1904) at p. 169. Hailsham, *Laws of England*, xx, § 782, and note (h), asserts that 'the Statute ceases to run during the period of the war', and distinguishes Lord Bramwell's *dictum* on the ground that the action related to a chose in action belonging to an alien enemy, i.e. a debt, but why I do not see.

² 'Effect of War upon the Operation of the Statutes of Limitation' in International Law Association's Reports for 1913-1914 and 1914-1915, at p. 158.

a Court of equity,¹ though, by section 29, 'Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise'.

Section 33 provides that

'Nothing in this Act shall (a) enable any action to be brought which was barred before the commencement of this Act by an enactment repealed by this Act [a very comprehensive list], except in so far as the cause of action or right of action may be revived by an acknowledgment or part payment made in accordance with the provisions of this Act; or (b) affect any action or arbitration commenced before the commencement of this Act or the title to any property which is the subject of any such action or arbitration.'

Section 22 enacts (subject to certain provisos) that

'if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years [one year in the case of actions against public authorities] from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.'

Section 31 (2) provides that

'For the purposes of this Act, a person shall be deemed to be under a disability while he is an infant, or of unsound mind, or a convict subject to the operation of the Forfeiture Act, 1870, in whose case no administrator or curator has been appointed under that Act.'

(The next subsection elaborates the definition of a person of unsound mind.) The absence of the defendant beyond the seas was a disability under some of the statutes repealed by the Act and is not preserved by the Act, from which it may be assumed that it has disappeared. We suggest that it must be assumed that section 31 (2) is exhaustive, and that no other kind of disability is recognized 'for the purposes of this Act'. The Act makes no provision for the interruption of the running of a period of limitation which has once started, by the occurrence of a disability, and it must be assumed that no interruption can take place, which was the general but not universal rule before the Act of 1939 came into operation.²

Note the character of these disabilities. Neither the Act, nor (we believe) the statutes³ repealed by it, said that no action could be brought

¹ See Preston and Newsom, *Limitation of Actions* (2nd ed.) (1943), ch. x.

² See *Bowring-Hanbury's Trustee v. Bowring-Hanbury* [1943] 1 Ch. 104.

³ They are numerous and it has not been possible to examine them.

during the existence of these disabilities. It said that it need not be. An infant can sue by his next friend. A person of unsound mind can sue by a guardian *ad litem*. A convict can procure the appointment of a curator or administrator. They are curable disabilities, though the persons affected by them are in such a position that the law mercifully refrains from penalizing them for not curing them. The first two, if not the third, are *inops consilii*. An alien enemy is in a totally different position. He has, in the words of Lord Stowell,¹ no '*persona standi in iudicio*' and is 'totally *ex lege*'. How can he be said to be lacking in diligence in not prosecuting his action? It is not the practice for the Crown to issue to him a licence to sue during the war, though if he has a right of action arising out of a licensed transaction the licence carries the right to sue. He is outside the protection of the King and, we suggest, outside the scope of any statute of limitation. He is off the legal map so far as enforcing rights are concerned. How then can periods for the limitation of action run against him?

For the *Limitation (Enemies and War Prisoners) Act*, 1945, see note on p. 81.

(ii) *American law*. The American view is that statutes of limitation are suspended during the war, though, apart from decisions arising out of the Civil War, which can only be applied to international law with caution,² the authority is slender.³ In *Hanger v. Abbott*,⁴ Clifford J., in delivering the judgment of the Supreme Court in a case of *assumpsit* to recover a pre-war debt, said:

'Peace restores the right and the remedy, and as that can not be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period. ...'

In another American case, *Brown v. Hiatts*,⁵ it was held that a period of limitation did not run during the Civil War against a plaintiff in respect of a right of action accruing to him against an enemy.

Hyde,⁶ the leading modern authority, says that 'the statute of limita-

¹ *The Hoop* (1799) 1 C. Rob. 196, 201.

² See Spaight, *War Rights on Land*, p. 13.

³ *Hopkirk v. Bell*, 3 Cranch. 454, is often cited as an authority, but I am doubtful whether it is precisely in point; see also Moore, *Digest of International Law*, § 1140, where other cases are cited. Williston, *Law of Contracts* (1922), § 2013, is weighty text-book authority in favour of the view stated above.

⁴ (1867) 6 Wall. 532; Hudson's *Cases on International Law* (2nd ed.), pp. 1317, 1320.

⁵ (1872) 15 Wall. 177. *Semmes v. Hartford Insurance Co.* (1871) 13 Wall. 158 turns upon a clause in a contract of insurance.

⁶ § 612, citing a number of decisions, and C. N. Gregory (quoted above at p. 76). And see J. B. Thayer and others in *Tulane Law Review*, xvii (1943), pp. 416 *et seq.*, and many decisions cited in Hackworth, *Digest of International Law*, vi. pp. 370-384, and two in the footnotes.

tions does not run against [alien enemies] while they are being deprived of their judicial remedies'.

Since the War of 1914 to 1918, several decisions have been given by Courts in the United States in favour of the suspension of the running of statutes of limitation in the case of causes of action accruing either (a) before the outbreak of a war which makes the plaintiff an enemy in the territorial sense, or (b) during such a war.

(a) *Pre-war causes of action.*

*Inland Steel Co. v. Jelenovic*¹ (workmen's compensation).

(But in *Nathan v. Equitable Trust Co.*,² it was held by the New York Court of Appeals, upon a statutory provision, that a statute of limitation was only suspended when the disability of being an alien enemy existed at the time of the accrual of the cause of action, and therefore was not suspended in the case of a pre-war debt. But 'unless plain language be disregarded' (as was said in the Opinion of the Court), we do not see how the Court could have come to any other conclusion upon the statute, and we should be surprised if the decision of the United States Supreme Court in *Hanger v. Abbott*, referred to above, were not followed in the absence of a contrary statutory provision.)

(b) *Cause of action accruing during the war.*

*Siplyak v. Davis*³ (workmen's compensation).

*Industrial Commission of Ohio v. Rotar*⁴ (workmen's compensation).

(iii) *Under Peace Treaties.* The Peace Treaties at the end of the War of 1914 to 1918,⁵ and the Peace Treaties now being concluded, have, however, withdrawn most of these questions from the operation of the ordinary rules of law and subjected them to treaty provisions,⁶ based, speaking generally, on the principle of the suspension of the running of time during the war.

¹ 150 North Eastern Reporter 391 (Appeal Court of Indiana); *Annual Digest*, 1925-1926, Case No. 343.

² 250 N.Y. 250 (New York Court of Appeals); *Annual Digest*, 1929-1930, Case No. 285.

³ 276 Pa. St. 49 (Supreme Court of Pennsylvania); *Annual Digest*, 1923-1924, Case No. 224 (with editorial note discussing many decisions).

⁴ 124 Ohio St. 418 (Supreme Court of Ohio); *Annual Digest*, 1931-1932, Case No. 226.

⁵ E.g. Article 300 (a) of the Treaty of Versailles. See Article 1 (xviii) of the Treaty of Peace Order amended from time to time, and *Public Trustee v. Davidson* [1925] Sessions Cases 451 (Scotland) and *Annual Digest*, 1925-1926, Case No. 349; *Administrator of Hungarian Property v. Finegold* (1931) 47 T.L.R. 288; *Administrator of Austrian Property v. Russian Bank for Foreign Trade* (1931), 47 T.L.R. 550; 48 *ibid.* 37, and *Weiser v. Ustav* (unreported) referred to in the volumes of the *Décisions des M.A.T.* See also *Mathias v. Mousa Seidah*, *Annual Digest*, 1935-1937, Case No. 230.

⁶ E.g. Annex xvi to the Treaty with Italy and corresponding Annexes to the

(iv) *Conclusion.* It is submitted that the American view is right and that the effect of the outbreak of war is to suspend the running of statutes of limitation, whether they have already begun to run or not.¹ Otherwise, it would in many cases be a mockery to suspend the right of action which belongs to an enemy in the territorial sense upon the outbreak of war or accrues to him during the war. It is not in accord with the general outlook of the common law to give with one hand and take away with the other; and to allow the right of action of an enemy to perish because he has no *persona standi in iudicio* comes very near to confiscation of his property, which can only be done by 'inquisition of office' or by legislation.

B. *Alien enemy defendant.* We have seen that an alien enemy *may* be sued during the war (a) upon a pre-war claim, whether a writ was issued before the war or not, and (b) upon a claim accruing during the war. Some means of substituted service must be found when the writ was not served before the outbreak of war. That is not the same as saying that a plaintiff *must* sue, or continue to sue, an alien enemy defendant during the war. It may become very difficult to substantiate a claim under war conditions, for instance, if evidence is required from persons on service or in enemy or enemy-occupied territory. A plaintiff can protect himself from the running of time against him by issuing a writ. Service, or substituted service, of the writ may be impossible, but there is every reason to expect that the Court will grant applications for renewal of the writ for successive periods of six months.² In view of these circumstances it may be right to say that the plaintiff has in the words of Best C.J.³ 'somebody that he can sue', though not at once or with effect, and accordingly that the statutes of limitation are not suspended during the war but will run in favour of the alien enemy defendant.⁴ As we have already seen,⁵ the operation of the ordinary rules of law may in many cases be excluded by the provisions of Peace Treaties.

¹ See Newsom in Preston and Newsom, *op. cit.* (Preface), for a different view when time has already begun to run.

² See *Battersby v. Anglo-American Oil Co.* [1945] K.B. 23.

³ In *Douglas v. Forrest* (1828) 4 Bing. 686, 704: 'Cause of action is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue.' Does this merely mean somebody that he can issue a writ against? See *Musurus Bey v. Gadban* [1894] 1 Q.B. 533, 542, 543.

⁴ Preston and Newsom, *op. cit.* p. viii, and the Committee on Limitation of Actions and Bills of Exchange (Cmd. 6591), consider that time runs in favour of such a defendant.

⁵ P. 79.

NOTE

Since the publication of the second edition of this book in 1944, the question of the operation of statutes of limitation during war has been clarified for the English lawyer by the publication of the Report of the Committee on Limitation of Actions and Bills of Exchange (Cmd. 6591, Chairman W. L. McNair, K.C.) and the ensuing Limitation (Enemies and War Prisoners) Act, 1945 (printed at the end of this volume), which is not confined to the recent war. The substantial provision of this Act, which must be referred to for its details and, in particular, for its definitions of 'action', 'enemy', 'enemy territory' and 'statute of limitation', is that, where any person, who would have been a necessary party to an action (plaintiff or defendant) at any time before the expiration of a period of limitation if it had then been brought, was an enemy or was detained in enemy territory, the operation of any statute of limitation is suspended *in favour of or against him* during the period of his being an enemy or being so detained and further shall in no case take effect until the expiration of twelve months from the date of his ceasing to be an enemy or to be so detained or until March 28, 1946, whichever is the later. An 'enemy' is a person who is, or is deemed to be, an enemy for the purposes of the Trading with the Enemy Act, 1939, subject to an enlargement of the definition of 'enemy territory' contained in the above-mentioned Limitation Act of 1945. It will be noted that prisoners of war and civilian internees in enemy territory are within the scope of these provisions. Another important class comprised within the Act is the persons detained (not necessarily by an enemy Government) in any of the numerous countries occupied by the enemy Powers.

CHAPTER 4

CONTRACTS: GENERAL PRINCIPLES¹ (EXCLUDING FRUSTRATION)

We shall deal with the matter under the following headings:

- A. Contracts made before the outbreak of war in so far as not completely performed,
 - (1) Where one of the parties becomes upon the outbreak of war an enemy in the territorial sense² and the other is in this country.
 - (2) Where, whoever and wherever the parties may be, the effect of the outbreak of war is to make further performance illegal.
- B. Contracts made before the outbreak of war, so far as concerns breaches which have already occurred and rights of action which have already accrued: Debts.
- C. Contracts made before the outbreak of war between the British Crown and persons who have become enemies in the territorial sense.
- D. Contracts which it is attempted to make during war.
- E. Contracts between persons in foreign non-enemy countries and enemies in the territorial sense.
- F. Contracts between persons in this country and enemy nationals in foreign territory neither owned nor occupied by the enemy Power.
- G. Contracts made between persons in enemy territory during war.

We shall not deal here with Impossibility and Frustration arising from war, and Particular Contracts.

A FEW PRELIMINARY REMARKS

(i) A good deal of confusion was introduced into this question by premature attempts to generalize before enough cases had arisen to enable a general outline of the relevant principles to be worked out. The Napoleonic Wars made a small contribution, the Crimean³ and the South African wars each another, though still a small one, and in the few years during which the mercantile community was clearing

¹ Attention is drawn to Annex xvi (Contracts, Prescription and Negotiable Instruments) to the Peace Treaty with Italy in 1946 and the corresponding Annexes to the Treaties with Roumania, Bulgaria, Hungary and Finland (all in Cmd. 7022) and to Article 81 of the Treaty with Italy and corresponding Articles in the other treaties other than that with Finland.

² That is to say, a person of any or no nationality who is voluntarily resident or carrying on business in enemy territory. See above, pp. 51, 52.

³ For the views prevailing in 1855, see a useful note appended to *Clementson v. Blessig* (1855) 11 Ex. 135.

the decks for the obviously impending War of 1914 to 1918 the strangest notions existed in the minds of business men and their legal advisers.¹ It was not until 1914 and 1915 that the actual effect of the full blast of war upon highly commercialized communities was perceived and the Courts became busy in working out the legal effects. We must avoid generalizations and over-simplifications. As Lord Dunedin said in the *Ertel Bieber* case:² 'There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies', and in *Ottoman Bank v. Jebara*:³ 'it is not every contract that is abrogated by war; it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy'.

(ii) It is helpful to distinguish between a right to the performance of a contract, which is a primary right, and a right of action to enforce it specifically (which is rare) or to recover damages for its breach, which is a secondary or remedial right.

As regards the right to performance, theoretically one of several events might happen: (a) abrogation, that is, complete dissolution of the contract from the moment of the outbreak of war; (b) suspension of performance until the end of the war, when the obligation revives; (c) no effect. We shall find that (a) is the normal event,⁴ while (b) and (c) are rare.

As regards the right of action, we shall find that when it has accrued to an enemy in the territorial sense, the usual result is that it is preserved for him, though he will not be able to enforce it during the war.

(iii) Another preliminary and rather theoretical point. When an English Court holds a contract in question before it to be illegal, what exactly does it mean? Not, we submit, necessarily that, if the particular contract were performed, mischief of the kind aimed at by the law must result, but that the contract belongs to a category which the Courts in the process of centuries have found to be mischievous and have therefore stigmatized as illegal and declined to enforce either specifically or by imposing damages for their breach.

(a) In consideration of one hundred guineas promised by A, I procure a marriage between A and B. They really wanted to marry one another but each party lacked the courage to approach the other, and the marriage turns out to be a marriage 'made in heaven'. No damage

¹ See for instance the undertaking given by the Chairman of Lloyd's in 1913 printed on p. 163 of the first edition (1920) of this book.

² [1918] A.C. 260, 269.

³ [1928] A.C. 269, 276.

⁴ Except in the case of a right to the payment of a debt, see p. 119.

has been done. Quite the contrary. But the contract is a marriage brokerage contract and my reward is only recoverable in heaven.

(b) Upon the outbreak of war with Germany in 1939 I communicate with the manager of my factory in Germany, without obtaining a licence, and through a pre-arranged secret channel, and I instruct him to send to England some blue-prints, my own property, which enable me to manufacture here a valuable engine. My motives are patriotic. Nevertheless my act is illegal because it belongs to the category of acts, namely, those involving intercourse with the enemy territory, which in the light of long experience have been found to be very dangerous to the State. As Lord Dunedin said of *The Hoop* in the *Ertel Bieber* case:¹

'The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because such contracts in general might enhance the resources of the enemy or cripple those of the subjects of the King.'

And as Lord Porter said in the *Soufracht* case² in criticizing *Rodriguez v. Speyer Brothers*:³

'the question, however, whether a given act is against public policy must, I think, be decided on general principles. It is not permissible to say that a particular act will not in fact assist the enemy. The proper enquiry is whether that act is of a class which is likely to assist him, and it is immaterial whether in the individual case he may or may not be found to profit from it.'⁴

There is nothing peculiar about this point. Whenever the law stigmatizes an act as illegal or criminal, it is because the act is within a category of acts which the experience of the law has found it to be necessary in the public interest to stigmatize as illegal or criminal. A rule of law is not made for particular individuals, though it is applied to them. It is general and is made for the community as a whole.

(iv) A few words must be added to what has been said in the opening pages of chapter 3 upon the different kinds of enemies.

(a) By *enemy in the territorial sense* is meant a person of any or no nationality who is voluntarily resident or carrying on business in enemy or enemy-occupied territory.

¹ [1918] A.C. 260, 273; and see Lord Atkinson at p. 277. For another illustration see *The Rapid* (1814) 8 Cranch 155; *Prize Cases Decided in the U.S. Supreme Court*, i, p. 474. See also Bailhache J. in *Mitsui v. Mumford* [1915] 2 K.B. 27, 33.

² [1943] A.C. 203, 251.

³ [1919] A.C. 59.

⁴ And see Lord Greene M.R. in *In re Anglo-International Bank* [1933] Ch. 233, 239.

(b) *Enemy in British territory and within the protection of the King.* Where the enemy party or parties to a contract are in British territory under the protection of the King, there is no reason why the existence of a state of war should in itself have any effect upon a pre-war contract¹ or a contract made during the war. The enemy living under the protection of the King retains his full contractual rights except in so far as specific legislation may affect them; for instance, a prohibition against buying a wireless transmitter. So the butcher or baker may lawfully continue to supply his enemy customers and make binding contracts with them. Suppose, however, that he is a prisoner of war *stricto sensu*. We have already examined cases² which tend to shew that he is within the King's protection and has contractual capacity. Suppose that he has been interned in pursuance of general policy and not by reason of an offence. We have already seen³ that at any rate his internment does not prevent him from enforcing a contract made by him before internment and after compliance with the requirement of registration, and there is no reason why he cannot validly enter into contracts during his internment, for he is within the protection of the King.

(c) *Enemy in British territory but not within the protection of the King.* As we have seen in dealing with procedural capacity,⁴ the plea of alien enemy may be employed to defeat the actions of both a person of any or no nationality who is an enemy in the territorial sense, and of a person of enemy nationality who is in this country but not within the protection of the King. Clearly the first of these persons lacks the power to make a contract with a person in this country during the war. Does the second? An enemy national in this country, whether he was here when the war broke out or came here subsequently, who has failed to register himself and comply with the requirements of the Aliens Restriction Acts, 1914 and 1919, the Aliens Order, 1920, as amended from time to time, and any other legislation, and thus notify the Crown of his presence here, is not within the protection of the Crown. If he is furthering the cause of the enemy, *cadit quaestio*; apart from other unpleasant consequences, he is 'adhering to the enemy' and can be defeated by the plea of alien enemy. But let us suppose that, excepting non-compliance with those Acts and that Order, he is leading an otherwise blameless life.

¹ *Schostall v. Johnson* (1919) 36 T.L.R. 75 (pre-war contract).

² Pp. 54-56.

³ *Schaffinius v. Goldberg* [1916] 1 K.B. 284 (C.A.) (post-outbreak of war contract); see *supra*, p. 57; *Nordman v. Rayner* (1916) 33 T.L.R. 87 (pre-war contract). But internment may have other consequences if it renders performance impossible.

⁴ P. 40.

Has he contractual capacity under our law? Can contracts be made with and enforced against him? The mischiefs normally attendant upon contracting with the enemy, namely, the enrichment of the resources of the enemy Power and the dangers of intercourse 'across the line of war', are lacking, and it would be unjust that a British subject innocently contracting with him, e.g. his butcher or baker, should be defeated by the plea of alien enemy when seeking to enforce his contract. Moreover, it is difficult to see how the unregistered enemy can continue to subsist except at the public expense unless he can earn a living and supply himself with the necessities of life. Contracting with this kind of enemy does not amount to 'trading with the enemy', either at the common law or by statute.¹ Can the answer be (in spite of Lord Stowell's remark upon the connection between contractual and procedural capacity quoted on the next page) that the unregistered enemy cannot during the war enforce pre-war contracts or enter into contracts enforceable by him but that nevertheless both may be enforced against him? Or is the cause of action against him upon war-time contracts *quasi ex contractu* for necessary purposes—food, lodging, raiment, employment, etc.?

(d) So much for the common law. As we have seen,² the Trading with the Enemy Act, 1939, as amended by the Defence Regulations, contains an elaborate definition of 'enemy' 'for the purposes of this Act'.³ One of the main 'purposes of this Act' is to prevent the making or the performance of contracts with the enemy, and there can be no doubt that the statutory enemy as therein defined is in the same position in point of contractual disability as the enemy in the territorial sense is in at common law.

(v) In using the expression 'outbreak of war' in relation to contracts and trading with the enemy, it must be borne in mind that certain other and subsequent events may have the same effect; for instance:

- (a) When non-enemy territory is occupied by the enemy;⁴
- (b) When non-enemy territory is ceded to the enemy during the war;

(c) When a person in this country transfers himself, or is transferred, during the war to enemy territory; thus in *Tingley v. Müller*⁵ the Court of Appeal held that Müller, an enemy national, who left this country in May 1915, must be assumed to have arrived in Germany on a certain date and then became an enemy in the territorial sense, which event would, had it not been for the peculiar character of the irrevocable

¹ Chapter 7.

⁴ P. 158, the *Fibrosa* case.

² P. 66.

⁵ [1917] 2 Ch. 144 (C.A.).

³ P. 68.

power of attorney previously granted by him, and of the agency thereby created, have avoided the agency, just as the outbreak of war would have done.¹

A. CONTRACTS MADE BEFORE THE OUTBREAK OF WAR²
IN SO FAR AS NOT COMPLETELY PERFORMED

Here, if we may anticipate the discussion which follows, the normal effect is abrogation as from the outbreak of war.³ This effect may result either (1) because one of the parties is in this country and the other becomes on the outbreak of war an enemy in the territorial sense, or (2) because, whoever and wherever the parties may be, the outbreak of war makes performance or further performance illegal. It may therefore be said that contracts in class (1) are abrogated *ratione personae* and those in class (2) *ratione materiae*.

(1) *Where one of the parties is in this country and the other becomes an enemy in the territorial sense.* In this case, however innocuous the actual performance required by the contract may be, the normal effect of the outbreak of war is that all further performance of it is prohibited, and the contract is abrogated or dissolved as from the date of the outbreak of war, subject to the preservation of accrued rights of action which will be discussed later; for instance, the engagement by a British operatic company of an enemy singer to sing in London. This effect may be based on one of two grounds—either (a) that it is a consequence of the disability of the enemy party to sustain a *persona standi in iudicio*,⁴ or (b) the illegality of any kind of intercourse with an enemy in the territorial sense.

Ground (a) was stated by Lord Stowell in *The Hoop*⁵ as follows:

‘In the law of almost every country, the character of alien enemy [i.e. in the territorial sense] carried with it a disability to sue or to

¹ See also a South African decision, *Treasury v. Gundelfinger and Kaunheimer*, S.A. Law Reports, 1919, T.P.D. 329; *Annual Digest*, 1919–1922, Case No. 280.

² For a case where a letter treated by the Franco-German Mixed Arbitral Tribunal as concluding the contract was in the post when war broke out, see *French and Italian Bank v. Warburg & Co.* (1922), *Recueil des décisions tribunaux arbitraux mixtes*, ii (1923), p. 249, and *Annual Digest*, 1919–1922, Case No. 275. For a comparison of the Anglo-American and the Continental doctrines as to the effect of war upon executory contracts, see *Binon v. German State and the Silesian Fire Insurance Co.*, *Recueil des décisions tribunaux arbitraux mixtes*, ii (1923), p. 217, and *Annual Digest*, 1919–1922, Case No. 274, and Garner, *International Law and the World War*, i, chap. ix.

³ See Annex xvi, A (1), of the Treaty with Italy and the corresponding Annexes to the Treaties with Roumania, Bulgaria, Hungary and Finland (all in Cmd. 7022).

⁴ See *Swinfen Eady L.J.* in *Zinc Corporation v. Hirsch* [1916] 1 K.B. 541, 558.

⁵ (1799) 1 C. Rob. 196, 201, though the actual trading there took place during war.

sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour.... A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence, and the whole of such commerce is attempted without its protection and against its authority.'

This is nullity rather than illegality.

Ground (b) is the surer and the more modern ground, and indeed there is not much difference between them. The illegality of any intercourse with the enemy was barely recognized as a ground of abrogation of contract until Lord Stowell's judgment in *The Hoop* in 1799 and Lord Alvanley's judgment in *Furtado v. Rogers*¹ in 1802; indeed we think it is fair to say that for an exhaustive consideration and an unequivocal establishment it had to await the judgment of Willes J. in the Exchequer Chamber in *Esposito v. Bowden*² in 1857. It is therefore not surprising to find Lord Stowell stating the matter rather differently—the more so as he was not being asked to enforce a contract but to condemn a cargo as prize on the ground of trading with the enemy.

(2) *Where the outbreak of war makes performance or further performance illegal, whoever and wherever the parties may be.* One of the simplest statements of the effect of war upon the kind of contract most commonly involved is Lord Lindley's in *Janson v. Driefontein Consolidated Mines*:³

'War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading: see *Esposito v. Bowden*.'⁴

For instance, a British charterer before the outbreak of war has chartered a British or allied or neutral ship to load a cargo at a port which becomes an enemy port, and the contract is still executory, i.e. the ship has not yet cleared from the enemy port. The contract is dissolved because further performance of it would involve illegal intercourse with enemy territory or persons. If she has loaded her cargo and cleared, and no further intercourse with enemy territory or persons is involved, the contract must be performed. The result is the same

¹ 3 Bos. & P. 191.

² 7 El. & Bl. 763.

if the charterer is an allied or neutral national who is resident or carrying on business within British territory. (Contracts between persons resident or carrying on business in non-enemy countries and enemies are considered later.¹)

Logically, these two classes (1) and (2) are distinct, but the series of decisions in which the rules have been developed does not preserve the distinction, and it would, we think, be pedantic and would present a false picture of the development of the law if we attempted to separate the two classes in our review of the cases. To-day the ground of abrogation in both classes is supervening illegality, though we must not forget that, as we have already seen, Lord Stowell in *The Hoop* in 1799 (speaking, it is true, of a contract which it was attempted to make during war) laid stress upon the inability of an enemy to sustain a *persona standi in judicio* as the ground of the non-existence of a contract made with an enemy.

What then is it that makes performance illegal? What are the acts performance of which is illegal? What is the mischief latent in the contract, or in the tendency of the contract, that makes it illegal?

There are two bases of illegality. The first is the extreme danger of permitting any kind of intercourse with enemy territory or any persons therein; the second is the necessity of repressing and prohibiting any contract which is injurious to the interests of this country, at any rate while the country is at war. The first is the more orthodox basis and the one most frequently invoked in the decisions; the second, though old, has again become prominent.

In 1915² Dr Baty concluded a review of the authorities by stating that

'the rule as to the invalidity of contracts with the enemy, and the suspension or dissolution of contracts made prior to the event of war, is derived mainly, if not entirely, from the danger and impossibility of permitting intimate intercourse between the subjects of enemy States; ... it is not derived from any abstract theory of individual hostility, nor (as mistakenly supposed in recent cases) on any imagined benefits of suppressing the enemy's trade, even when conducted with ourselves.'

Lord Dunedin has described as 'landmarks in the law on the subject' *The Hoop* (1799),³ *Furtado v. Rogers* (1802),⁴ and *Esposito v. Bowden* (1857),⁵ and all these cases are reviewed by him in his judgment in the *Ertel Bieber* case about to be discussed.⁶ *Furtado v. Rogers* contains

¹ See p. 112.

² 31 L.Q.R. (1915) at p. 49.

³ *Supra*.

⁴ *Supra*.

⁵ *Supra*.

what may, we think, be called the classic statement of the second and wider basis of illegality, occurring in the judgment of the Court of Common Pleas delivered by Lord Alvanley C.J.:¹

'We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of parliament.'

'From these cases [says Lord Dunedin in the *Ertel Bieber* case]² I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.'

This statement relates to contracts to which one of the parties is an enemy in the territorial sense. But the mischiefs referred to by Lord Dunedin also exist in the case of a contract to which there is no party who is an enemy in the territorial sense but the performance of which involves a person who is in, or is carrying on business in, British territory, in intercourse with the enemy, as in *Esposito v. Bowden*. In that case a charterparty had been entered into before the Crimean War between a British charterer and a Neapolitan shipowner, whereby the latter undertook to send a ship to Odessa to load a cargo of wheat and the former undertook to load it there. Upon the outbreak of that war, before the ship arrived at Odessa, the British charterer declined to load her on the ground that it was impossible for him to do so without trading with the Queen's enemies. (The Kingdom of the Two Sicilies was neutral.) In an action brought by the Neapolitan shipowner the Court of Exchequer Chamber upheld the plea of the British charterer.

¹ At p. 198, cited by (*inter alios*) Swinfen Eady L.J. in *Zinc Corporation v. Hirsch* [1916] 1 K.B. 541, 558.

² [1918] A.C. 260, 274. Mendelssohn-Bartholdy maintained (see Schuster in *British Year Book of International Law*, 1920-1921, p. 183) in the *Deutsche Juristenzeitung* (xx, pp. 662-667 (not available to me)) that the 'acceptance by English authorities as rules of international law' of the general principles governing pre-war contracts with enemies illustrated in the *Ertel Bieber* case is 'due to a falsified quotation from Bynkershoek (*Quaestionum Juris Publici Libri Duo*, i, chap. vii—towards the end) in the course of Lord Stowell's well-known judgment in *The Hoop*'. I do not understand this statement. Lord Stowell's quotation from Bynkershoek is an accurate reproduction of the passage as it occurs in the text of 1737 adopted by the Carnegie Endowment for its reprint of the Classics of International Law, and he appears to me to have correctly apprehended and applied it.

³ And the second might exist

'It is now fully established (said Willes J.)¹ that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal.'

Later he said:²

'The force of a declaration of war is equal to an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an Act of State, done by virtue of the Prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law... As to the mode of operation of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared... the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it.'³

This decision makes it clear that the abrogating effect of war upon contracts involving intercourse with the enemy is not due, or at any rate not solely due, to any intrinsic legal impossibility of the continued existence of a contractual relationship between parties 'separated by the line of war'.⁴ It is due to the mischief (of either kind) which results from intercourse between a person in this country and a person in the enemy country.

Let us now apply Lord Dunedin's statement quoted above to some common transactions entered into before the outbreak of war.

(a) Upon the outbreak of war one of the parties to a contract of agency becomes an enemy in the territorial sense, while the other is in this country. The contract is thereupon *ipso facto* dissolved.⁵

(b) One of the members of a partnership becomes an enemy in the territorial sense, while the other is in this country. The contract is *ipso facto* dissolved upon the outbreak of war.⁶ What happens to the assets is a different matter.

(c) A contract for the sale of goods provided for the shipment of goods to or from an enemy country from or to this country on a date

¹ 7 El. & Bl. 763, 779. And see Lord Reading C.J. in *Porter v. Freudenberg* [1915] 1 K.B. 857, 867, 868, as to the foundation of this rule, which includes 'public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in addition to the credit, money or goods, or other resources available to individuals in the enemy State'.

² At p. 781.

³ At p. 783.

⁴ See note 2 on p. 114.

⁵ *Maxwell v. Grunhut* (1914) 31 T.L.R. 79 (C.A.).

⁶ *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen Industrie* [1918]

at which there is in fact a state of war. It is *ipso facto* dissolved upon the outbreak of war.

(d) In a similar contract of sale the date of delivery of the goods is such that the war may be over, or is in fact over,¹ before the date arrives. The contract is nevertheless dissolved upon the outbreak of war. The Court will not speculate upon the duration of a war. As Lush J. said in *Geipel v. Smith*:² 'A state of war must be presumed to be likely to continue so long, and so disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.'

The meaning of 'executed' and 'executory contracts'. In the *Ertel Bieber* case Lord Dunedin said (at p. 267):

'a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require . . . commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy [*scilicet*, an enemy in the territorial sense], or anyone voluntarily residing in the enemy country.'

He added that 'intercourse' is enough without the epithet 'commercial'. The expression 'executory contracts' requires examination. The terms 'executed' and 'executory consideration' are well established and have well-recognized meanings. The terms 'executed' and 'executory contracts' are not so well defined and are avoided by many judges and text-writers. Anson, *Law of Contract*,³ tells us that "'executed contract" means a contract performed wholly on one side, while an "executory contract" is one which is either wholly unperformed or in which there remains something to be done on both sides'. If this is the right meaning of 'executed contract', it would not be correct to say that the outbreak of war never abrogates an 'executed contract'; for instance, in August 1939, A in England agrees with B in Germany that in consideration of £100 then received A will manufacture certain articles and send them to Germany in the course of December 1939; surely the outbreak of war on September 3, 1939, frees A from this obligation and destroys it, whether or not after the war B may be able to recover from A any part of the sum of £100. Suppose, however, a

¹ Lord Parker speculated upon this point in the *Ertel Bieber* case [1918] A.C. 260, 283: 'It may be that a contract for the sale of goods to be delivered at a future date is abrogated by a war which begins and is brought to a conclusion between the date of the contract and the date fixed for delivery, but I prefer not to express an opinion upon this on the present occasion.' It is submitted that there can be no doubt that the contract is abrogated.

² (1872) L.R. 7 Q.B. at p. 414.

³ (18th ed. 1937), p. 14, note.

pre-war contract for the manufacture and sale of certain articles by *A* for delivery to *B* in Germany in consideration of £100 payable by *B* on December 31, 1939; before the outbreak of war *A* has delivered the articles to *B*; it is submitted that the right to the payment of £100 is a debt, though not presently payable, and is not destroyed by the outbreak of war; everything has happened that is needed to make the payment due except the lapse of time. (See Note at the end of this chapter, where this point is developed.) Nor, it is submitted, is it correct to say that the outbreak of war abrogates all 'executory contracts', unless we exclude that part of an executory contract which consists of the payment of a liquidated sum of money; thus, *A* in London is the manager of a German company, *B & Co.*, operating in England; he is employed by the calendar year at a salary of £1200 payable monthly; on September 3, 1939, he has not received his salary in respect of August 1939; the contract is executory and is certainly abrogated, but *A*'s right to recover £100 for his August salary survives the outbreak of war.¹

It is suggested, therefore, that the distinction between 'executed' and 'executory contracts' may not be very helpful in this connexion and that it may be found safer to say that (apart from the special cases of 'suspension' and 'no effect' considered later)² the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting³ right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war.⁴ (We have not complicated the argument by dealing with severable contracts, but in that case each part for this purpose would be treated as a separate contract.)

Suspensory clauses. Suppose that the parties to the contract in their anxiety to preserve it from the dissolving effect of war have introduced into it a clause whereby all performance shall be suspended during war and only resumed when the war is over. This point was the subject of much litigation during the War of 1914 to 1918.⁵ For instance, there were in existence upon the outbreak of that war a number of long-

¹ See *Distington Hematite Iron Co. v. Possehl & Co.* [1916] 1 K.B. 811, 813, where Rowlatt J. came near this point but refrained from deciding it.

² Pp. 98-101.

³ If a breach has already occurred, the right of action survives the outbreak of war: see later, p. 101.

⁴ In *Schering Ltd. v. Stockholms Enskilda Bank* [1946] A.C. 219, 240, Lord Thankerton was inclined to agree with the suggestion made in the text.

⁵ *Zinc Corporation v. Hirsch* [1916] 1 K.B. 541 (C.A.); *Clapham Steamship Co.'s Case* [1917] 2 K.B. 639; *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft* [1918] 1 K.B. 331; [1918] 2 K.B. 486 (C.A.).

term contracts for the delivery of ores of various kinds to German firms in which the parties had been astute enough to insert clauses purporting to suspend the delivery of instalments in the event of war, which presumably meant or included war between the British and German Empires. The effect of these clauses was considered by the House of Lords in three appeals heard together,¹ and it is now possible to summarize the various grounds on which the law will hold such contracts dissolved and not merely suspended.² The principal grounds are

(i) The abrogation by the outbreak of war of all (or most) executory contracts requiring for their further performance intercourse with the enemy—as explained by Lord Dunedin in the passage last quoted.

(ii) That even if the suspensory clauses are adequate to suspend deliveries, there are other obligations in the contracts not covered by the suspension, for instance, arbitration, declaration of quantities and character, which must or might involve intercourse during the war.

(iii) That even if the interpretation of the suspensory clauses is such as to suspend the entire operation of the contract during the war, the clauses would be contrary to public policy on the ground that they cripple the trading resources and operations of this country and enhance those of the enemy by ensuring to him a supply of raw materials upon the conclusion of peace. (This ground rests on our second basis of illegality, namely, that the clause is detrimental to the interests of this country.)

(iv) That, while deliveries during the war are illegal on ground (i) above mentioned, to hold that the British subject remained liable to make 'the deliveries, if any, which, according to the contract, fall to be made after the war is over'³ would impose upon the parties a new contract and would be contrary to the decisions of the House of Lords in *Horlock v. Beal*⁴ and *Metropolitan Water Board v. Dick, Kerr & Co.*⁵ (This ground rests on Frustration.)

¹ *Ertel Bieber & Co. v. Rio Tinto Co.*, and two other cases [1918] A.C. 260; followed in *Fried Krupp Aktien-Gesellschaft v. Orconera Iron Ore Co.* (1919) 88 L.J. Ch. 304.

² The initial difficulty of bringing such a matter before the Courts at all during war was obviated by the Legal Proceedings Against Enemies Act, 1915, enabling a British subject to obtain a declaration upon such a contract. This statute has expired and no similar legislation was passed during the recent war, though the rule of the Supreme Court referred to above at p. 71 to some extent met the need.

³ Per Lord Parker [1918] A.C. at p. 283.

⁴ [1916] 1 A.C. 486.

⁵ [1918] A.C. 119.

The argument derived from the effect upon the resources of both parties and through them of their respective countries referred to in (iii) is not a mere echo of the Paris Resolutions of 1916 upon economic warfare,¹ though possibly deriving some moral support from them. The effect of an immediate certainty of a future event is, or may well be, itself immediate and not merely future.

‘It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realized by means of assignation to neutral countries.’²

It is clearly a benefit to the enemy to tie up British resources during the war so that they may become available to the ex-enemy as soon as the war is over. Lord Alvanley pointed out in *Furtado v. Rogers*³ that if the enemy is to receive his insurance indemnity after the war, he ‘is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter’.

This doctrine of the present value to the enemy of some post-war benefit is now well established, but it should be noted that its logic has not been fully applied. If everything which might benefit the enemy during or after the war is to be illegal, and forbidden on grounds of public policy, then it should follow that all private enemy property in this country should be confiscated (which is not done, though the Crown has power to do it⁴); that rights of action accrued to enemies on the outbreak of war should be destroyed and not suspended; and that section 7 of the Trading with the Enemy Act, 1939, which empowers the Board of Trade to vest enemy property in custodians ‘with a view... of preserving [it] in contemplation of arrangements to be made at the conclusion of peace’ is a grim joke.⁵ Lord Parker made some remarks in the case of *Daimler Co. v. Continental Tyre and Rubber Co.*⁶ upon the heresy of arguing that ‘acts, otherwise lawful, might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over’, but he explained their limited application at a later date.⁷

¹ Cd. 8271 of 1916.

² Per Lord Dunedin [1918] A.C. at p. 275. See also Viscount Simon L.C. in the *Souffracht* case [1943] A.C. 203, 212.

³ *Supra*, cited [1918] A.C. at p. 274.

⁴ By inquisition of office; see *In re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107.

⁵ The wording is somewhat different in the Trading with the Enemy Amendment Act, 1914.

⁶ [1916] 2 A.C. 307, 347.

⁷ [1918] A.C. at p. 284. Note, however, the effect they produced upon the Court of Appeal in *Tingley v. Müller* [1917] 2 Ch. 144 (C.A.).

A good illustration of the long-term contract type of case and of the method of handling it, which received the approval of the House of Lords, will be found in *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*.¹ The facts raised most of the points common in these cases, and the judgment of McCardie J. reviewed all the relevant authorities. It appears to have been delivered two days before the House of Lords gave judgment in the *Ertel Bieber* case,² but the conclusions are the same and it cites a wealth of authorities.

The *Ertel Bieber* case formed a precedent for numerous similar judicial declarations that contracts of this nature were abrogated and dissolved on the outbreak of war.

In one of these cases³ an ingenious but unsuccessful attempt was made to avoid the consequences of the *Ertel Bieber* precedent by suggesting that a contract for the supply of iron ore over a period of 99 years was analogous to a lease and should be treated as a 'concomitant of the rights of property',⁴ and so not abrogated.

The disability of the enemy to sue can in effect be removed by the appointment of the Board of Trade of a controller under the Trading with the Enemy Act, 1939, who thereupon is able to collect the assets of the enemy person, firm, or company and to sell them, and for those purposes to sue (for instance, for the price of goods sold) without being defeated by the plea of alien enemy.⁵ But the effect of such an appointment is not to revive dissolved contracts.⁶

Restrictive covenant in favour of an enemy.— Closely akin to the suspensory clause is the restrictive covenant which requires a party to a contract not to sell a particular commodity during a certain number of years to any person other than the other party who has become an enemy in the territorial sense. Such a covenant is discharged by the outbreak of war, because it is detrimental to the interests of this country.⁷

The operation of dissolution. Having thus ascertained that the general rule is dissolution, we may inquire how it takes effect. It seems safe to say⁸ that the effect is the same as that which occurs when a contract is discharged by supervening impossibility of performance or by frustration, and the reader is referred to chapter 6 on Frustration of Contract.

¹ *Supra*.

² *Supra*.

³ *Fried Krupp A.-G. v. Orconera Iron Ore Co.*, *supra*.

⁴ Lord Dunedin's expression [1918] A.C. at p. 269.

⁵ *Continho Caro & Co. v. Vermont & Co.* [1917] 2 K.B. 587.

⁶ Per Younger J. *In re Coutinho Caro & Co.* [1918] 2 Ch. 384, 389.

⁷ *Zinc Corporation v. Hirsch* [1916] 1 K.B. 541, 558, 562, 564. See below, p. 293.

⁸ In several of the frustration cases the cause of frustration is supervening illegality, see chapter 6.

Lord Atkin has described it as an 'elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged'.¹ It is submitted that this statement is also true when further performance becomes illegal owing to the outbreak of war.

Dissolution is not the same thing as avoidance *ab initio*, and any rights of action already accrued to an enemy will be dealt with on the lines to be discussed later.²

Conflict of Laws. The second and third of the *Rio Tinto* cases³ raised a point on the Conflict of Laws which, as it has no necessary connexion with the effects of war and is thus not strictly germane to the content of this chapter, may be very shortly stated: even if it were true that the German contracts involved in those two cases and the circumstances of their making attracted German law for their interpretation, and even if a German Court would hold that they were not contrary to rules of English public policy, they could not be enforced by an English Court because to do so would be contrary to rules of English public policy. 'It is illegal for a British subject to become bound in a manner which sins against the public policy of the King's realm.'⁴ The importance of this point lies in the fact that some contracts—particularly of sale of goods and of insurance—between British and foreign parties contain a clause whereby the parties accept the law of a foreign country as the law governing the contract.* This decision enables us to say that, so far at any rate as illegality is concerned, the position of a contract which an English Court would refuse to enforce because it offends the principles which we have been discussing, cannot be improved by resort to an agreed system of foreign law.

Redintegration of dissolved contract. In *Esposito v. Bowden*,⁵ arising out of the Crimean War, it was urged that, notwithstanding the declaration of war which dissolved a charterparty by making performance of it illegal, it was *ipso facto* revived by a British Order in Council made seventeen days later which permitted British charterers to load cargoes at unblockaded enemy ports. Lord Campbell C.J. rejected this plea, saying that the Order in Council 'if contemporaneous with

¹ *Reilly v. The King* [1934] A.C. 176, 180.

² P. 101.

³ Those brought against *Dynamit Actien-Gesellschaft* and *Vereinigte Koenigs and Laurahuette Actien-Gesellschaft* [1918] A.C. 260, 292, 303. See also an American decision *Rossie v. Garvan* (1921) 274 Fed. 447; *Annual Digest*, 1919-1922, Case No. 281.

⁴ Per Lord Dunedin in [1918] A.C. at p. 294.

⁵ (1855) 4 El. & Bl. 963, 975. The same point was argued in the Exchequer Chamber and Lord Campbell's opinion was expressly upheld, though on other grounds the judgment of the Court of Queen's Bench was reversed; (1857) 7 El. & Bl. 763, 778.

the declaration of war might have been material: but it could have no operation to prevent the alleged dissolution of the contract; and the contract, once dissolved, could not be reintegrated by it'.

Suspension. In the early days of the War of 1914 to 1918, before the principles governing the effect of war upon contracts had passed through the forensic and judicial furnace and been purified, there was but little authority to guide the legal advisers of parties to pre-war contracts who found themselves separated by the line of war, and much doubt prevailed as to the effect of the outbreak of war upon such contracts. In particular, there was doubt on the question whether the normal effect upon such a contract was to 'suspend' it, that is to say, performance of it, or to dissolve it. Moreover, the word 'suspend' was used somewhat loosely and ambiguously.¹ These doubts were due in part to a lack of appreciation of the distinction already referred to, in relation to a pre-war contract, between a right of action,² which is suspended until after the war when the action may be brought, and a right of performance,³ which in the vast majority of cases is destroyed by reason of the abrogation or dissolution of the contract. It is suggested that much of this uncertainty was due to an unfortunate passage occurring in the speech of Lord Halsbury L.C. in *Janson v. Driefontein Consolidated Mines*,⁴ when he said:

'No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract [that is, we suggest, rights of action which had accrued before the outbreak of war] are unaffected, and when the war is over the remedy in the Courts of either is restored.'⁵

Rowlatt J. in *Distington Hematite Iron Co. v. Possehl & Co.*⁶ took an important step towards the elucidation of the meaning of 'suspension' when he said, dealing with a pre-war contract of sale for an indefinite number of years between a British vendor of pig-iron and an enemy purchaser (carrying on business in enemy territory):

'The question is whether this contract is dissolved. The defendants have cited dicta⁷ to the effect that contracts are not dissolved but are suspended by war. This is a loose expression which gives rise to con-

¹ See Lord Justice MacKinnon's *Effect of War on Contract* (1917), pp. 17, 18. The same ambiguity existed in the case of contracts between parties not separated by the line of war of the kind which became familiar in the 'frustration' cases.

² Which is a secondary or remedial right.

³ Which is a primary right.

⁵ See Lord Dunedin [1918] A.C. at p. 269.

⁷ E.g. from *Janson v. Driefontein Consolidated Mines* (*supra*).

⁴ [1902] A.C. 484, 493.

⁶ [1916] 1 K.B. 811, 813.

fusion. The words themselves really mean that during war there is an interval in which the parties are not in contractual relations. But that is not the sense in which the phrase is used. It is used to convey the meaning that performance of the obligations of the contract is either postponed during war or that obligations falling due during war are cancelled, leaving a number of others to be performed in the ordinary way at the end of the war. That is the sense which the defendants wish to convey. The plaintiffs contended that all contracts were dissolved by war except executed contracts where payment is the only obligation remaining to be performed, in which case, they suggest, payment may be postponed until after the war. I am not going to lay down that proposition in the present case.'

He then proceeded to hold that the contract was dissolved by the outbreak of war on the ground that to hold that the parties were bound by the contract for an indefinite time, while being unable to act upon it, would be to 'substitute a different contract for it'. This is, in effect, to hold that the contract was dissolved by frustration. With great respect, it is believed that at a later stage in the war the learned judge would, having regard to the development of the decisions, have been content to hold that the contract was dissolved upon the outbreak of war by reason of supervening illegality.

Are there then any true cases of suspension—that is to say, cases where the effect of war is merely to suspend performance or further performance of the contract, and not to abrogate the contract? •

The shareholder's contract of membership of the company can properly be described as an instance of suspension.¹ During the war a shareholder in a British company who becomes an enemy in the territorial sense cannot exercise any of a shareholder's rights, such as the right of voting, nor can he receive dividends, but his share is not extinguished (unless the Crown chooses to confiscate it by 'inquisition of office') and after the war he will resume his rights and perhaps recover any accumulation of dividends. This contract may be regarded both as a contract and as a piece of property, and we are reminded of Lord Dunedin's expression: 'concomitants of rights of property'.²

¹ *Robson v. Premier Oil and Pipe Line Co.* [1915] 2 Ch. 124 (C.A.); see later, p. 221.

² [1918] A.C. at p. 269, an expression discussed in *Schering Ltd. v. Stockholms Enskilda Bank* [1946] A.C. 219. Note the word 'suspended' in clause 2 of Article 296 of the Treaty of Versailles, and its application to the contract of banker and customer in *Le Rossignol v. Deutsche Bank* (1924), *Décisions des tribunaux arbitraux mixtes*, iv, p. 10. English law would regard the credit balance as a pre-war debt, the right of action to which, if it had accrued, was suspended like other rights of action. In the case cited the customer's credit account received additions during the war.

No effect. In rare cases, not easy to classify, the effect of the outbreak of war upon a contract between a person in this country and an enemy in the territorial sense may be *nil* or almost *nil*. In *Halsey v. Lowenfeld, Leigh and Curzon Third Parties*,¹ it was held that rent falling due during the war under a pre-war lease could be recovered by a lessor in this country, in respect of premises in this country, from a lessee who was resident in enemy territory. This does not mean that the lessee could have sued during the war upon the lessor's covenants, for he would have been defeated by the plea of alien enemy; but it does shew that the outbreak of war did not dissolve the contract. It was manifestly to the benefit of this country that the lessor should receive the rent, and the Trading with the Enemy Proclamation of September 9, 1914 (probably declaratory in this respect), authorized its receipt. Lord Reading C.J. upheld² 'the continued validity of the lease at [*scilicet* after] the outbreak of war', and rejected the contention 'that a lessee who has become an alien enemy is released from all obligations undertaken before the war'—provided, of course, that the Crown does not deprive him of his property. 'It would indeed be a strange result if a law so founded was held to apply to relieve an alien enemy of obligations incurred before the war in respect of property of which he is not deprived by the Crown.'³ It would seem to follow that after the end of the war the lease (if the term had not expired and the lease had not been forfeited) would continue. A lease is something more than a contract; it creates an estate by demise for a term of years and vests it in the lessee: see Lush J. in *London & Northern Estates Co. v. Schlesinger*⁴ and Lord Reading C.J. in *Whitehall Court, Ltd. v. Ettlinger*.⁵

In *Tingley v. Müller*⁶ an irrevocable power of attorney for the sale of land was not revoked by the fact of the donor becoming an enemy in the territorial sense (which for our present purpose is equivalent to the outbreak of war). These two decisions relate to property as well as contract, and therein probably lies their explanation.

We are again reminded of Lord Dunedin's expression⁷ 'concomitants of rights of property'.

It need hardly be said that where a contract creates a status, such as

¹ [1916] 1 K.B. 143; 2 K.B. 707 (C.A.). *Porter v. Freudenberg* [1915] 1 K.B. 857 (C.A.) also arose upon a pre-war lease and the plaintiff sued for rent falling due after the outbreak of war, but the point that the lease was terminated by the outbreak of war was not taken, the defendant not being represented.

² [1916] 2 K.B. at p. 713.

³ *Ibid.*

⁴ [1916] 1 K.B. 20, 24.

⁵ [1920] 1 K.B. 680, 686; see below, ch. 14.

⁶ [1917] 2 Ch. 144 (C.A.); see above, p. 60.

⁷ [1918] A.C. at p. 269.

marriage, that status is not affected by the outbreak of war, even though one party might be in this country and the other in enemy territory.¹

B. CONTRACTS MADE BEFORE THE OUTBREAK OF WAR,² SO FAR AS CONCERNS BREACHES³ WHICH HAVE ALREADY OCCURRED AND RIGHTS OF ACTION WHICH HAVE ALREADY ACCRUED: DEBTS⁴

Where one of the parties becomes upon the outbreak of war an enemy in the territorial sense and the other is in this country, we must consider what happens (a) when a right of action has already accrued to the enemy, and (b) when it has already accrued against him.

(a) If a right of action has accrued to an enemy in the territorial sense, it is not destroyed by the outbreak of war but is suspended. There is, of course, a difference between the primary right to the performance of a contract, and the secondary right of action to enforce it specifically (which is rare) or to recover damages for its breach. This secondary, remedial, right is a piece of property, a chose in action, and is not destroyed by the outbreak of war.⁵ As Lord Stowell said in *The Neustra Senora de Los Dolores*⁶ of a decree for the restitution of a ship and for costs and damages, made in favour of a Spaniard who became an enemy by the outbreak of war before the ship had been restored or the costs and damages assessed:

‘It is true that the intervention of hostilities puts the property of the enemy in such a situation that confiscation may ensue, but unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the owner revives on the return of peace. This is an acknowledged principle in the Courts of common law...’

¹ For marriage during the war by a British subject with an enemy subject, both in enemy territory, see *Fashender v. Attorney-General* [1922] 1 Ch. 232.

² Above, p. 86.

³ It may be that the breach was of such a character that it gave rise not only to a right of action but also to a right in the other party to treat the contract as discharged from that moment. If he has already exercised the latter right, well and good; the contract is at an end except for the right of action, and it is unnecessary to discuss any further effect of the outbreak of war upon the contract. If he has not already exercised that right, he has delayed at his peril and can no longer exercise it when the contract has been dissolved by the outbreak of war: *Reid v. Hoskins*, and *Avery v. Bowden* (1856) 6 El. & Bl. 953; there both the parties in each case were British, but the result would be the same if one party to each contract had become an enemy in the territorial sense.

⁴ See also Note at end of this chapter, below, p. 119.

⁵ Note how in *Schering Ltd. v. Stockholms Enskilda Bank* (see below, p. 237) the right of action of a neutral company against a British company was suspended during the war because its enforcement would operate to confer a benefit upon an enemy.

⁶ (1809) Edw. 60.

If the Crown does not confiscate the right of action by the appropriate process before the end of the war,¹ and if Parliament does not deprive the enemy of it, and if by the treaty of peace it is not surrendered by the enemy State, the ex-enemy will be able to enforce it after the war.² His right of action may be for unliquidated damages or for liquidated damages or for a debt, and there appears to be no reason why he should not in appropriate cases be able to obtain a decree of specific performance or an injunction.

*Ex parte Boussmaker*³ appears to be one of the first cases in which the effect of the outbreak of war upon an already accrued right of action, in that case a debt, was considered. An alien enemy (almost certainly in the territorial sense) was a petitioning creditor, and there was an appeal to the Lord Chancellor from the refusal of the Commissioners in Bankruptcy to admit the petition. Lord Erskine L.C. admitted the petition, saying:

'If this had been a debt arising from a contract with an alien enemy [i.e. an enemy at the date of the contract], it could not possibly stand; for the contract would be void. But, if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but, the contract being originally good, upon the return of peace the right would survive... Though the right to recover is suspended, that is no reason, why the fund should be divided amongst the other creditors... Let a claim be entered; and the dividend be reserved.'

He points out the importance of the matter 'from the analogy to the case of an action'.

The rule of suspension of the pre-war right of action has been recognized in several cases upon insurance policies but is in no way confined to them. In *Flinndt v. Waters*,⁴ where the assured were alien friends when the policy was effected and the loss took place, Lord Ellenborough C.J., in delivering the judgment of the King's Bench

¹ 'Inquisition of office' applies to choses in action: *Attorney-General v. Weeden and Shales* (1699), Parker 267.

² The question of the running of Statutes of Limitation has already been discussed.

³ (1806) 13 Ves. Jun. 71. In *Alcinous v. Nigreu* (1854) 4 El. & Bl. 217, 219, an action for work and labour brought by a person who became an enemy 'since the last pleading in the action', Lord Campbell C.J. said: 'The contract, having been entered into before the commencement of hostilities, is valid; and, when peace is restored, the plaintiff may enforce it in our Courts.' It must be assumed that Lord Campbell meant that the right of action for breach of the contract would survive the war.

⁴ (1812) 15 East 260, 266.

in an action brought by an agent of the assured against an underwriter (apparently British), said:

'The insurance, the loss, and cause of action had arisen before the assured had become alien enemies: when therefore they became such, it was only a temporary suspence (*sic*) of their own right of suit in the Courts here, as alien enemies....'¹

Substantially the same point arose, together with others, in *Janson v. Driefontein Consolidated Mines*,² where however the plaintiffs themselves were alien enemies, being a company incorporated in an enemy country, though permission to the defendant, a British underwriter, to waive the plea of alien enemy so as to enable the action to be tried during the war ought not to have been granted and a repetition of this practice is not likely to occur.³ The plaintiffs sued to recover a loss occurring shortly before the outbreak of war upon a policy of insurance, which insured the plaintiffs' gold *inter alia* against 'arrests, restraints, and detainments of all kings, princes, and peoples'. Seven days before a state of war between Her Majesty and the South African Republic began, the gold was seized on the frontier during transit by the Government of the Republic. Thus the loss had occurred before the outbreak of war. The House of Lords affirmed the judgment of the Court of Appeal in favour of the plaintiffs. Lord Lindley, whose speech we find the most helpful of those made in the House of Lords, approved *Flindt v. Waters*, together with the statement based upon it contained in Arnould on *Marine Insurance*:⁴ 'Where the party intended to be insured by the policy does not become an alien enemy until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities and revives on the restoration of peace.' Upon this point we do not think there was serious doubt. The main controversy turned on the questions when a state of war can be said to arise and how war can be distinguished from the strained relations and preliminary acts of violence which frequently precede its actual outbreak.

¹ He goes on to say that this suspension could not, having regard to the form of the pleading, prevent the plaintiff, a British subject, the agent of the assured, from recovering, but I think we must regard that statement as due to the form of pleading in which the plea of alien enemy had been raised.

² [1902] A.C. 484. And see Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co.* (1918) A.C. 260, 269: 'Accrued rights are not affected, though the right of suing in respect thereof is suspended.' See the following United States decisions to the same effect: *Zimmerman v. Hicks* (1925) 7 Federal Reporter (2nd) 443 (Cir. Ct. of App. 2nd Cir.); *Neumond v. Farmers' Feed Co.* (1926) 244 N.Y. 202; *Annual Digest*, 1925-1926, Cases Nos. 333 and 336.

³ See above, p. 44.

⁴ (6th ed.), i, p. 135.

For an instance occurring during the War of 1914 to 1918 we may turn to *Zinc Corporation v. Hirsch*,¹ where the Court of Appeal had to consider the position of a long-term pre-war contract for the supply of zinc concentrates by a British company to a firm carrying on business in Germany. While holding that the effect of the outbreak of war was to dissolve the contract 'so far as regards the future performance after August 4, 1914', Swinfen Eady L.J. said: 'The remedy of either side² for what had previously been carried out remains in abeyance until the termination of the war: see *Esposito v. Bowden*;³ *Janson v. Driefontein Consolidated Mines*,⁴ per Lord Lindley.' It is only the fact that the English Courts are not open during the war to the enemy which makes his pre-war right of action unenforceable during the war; and the plea of alien enemy is then a plea in abatement and not in bar.⁵ Accordingly, it is submitted that if anything should happen during the war to extinguish his enemy status, he could at once sue. As Lord Stowell said in *The Hoop*,⁶ speaking of the plea of alien enemy:

'The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice* . . .'

Quære: an enemy national in enemy or enemy-occupied territory later occupied by Great Britain or her ally?

We have already⁷ examined the question of the running of Statutes of Limitation during war and have submitted the view that time does not run against an enemy in the territorial sense. To say to him, 'You cannot sue here during the war', and then, when he sues after the war, tell him that the claim is barred, is not the kind of thing that the common law teaches us to expect of her. The matter is now regulated by the Limitation (Enemies and War Prisoners) Act, 1945.

(b) When it is the enemy who has broken the contract before the outbreak of war, the law does not prevent the other party from suing him here during the war, whether a writ had been issued before the

¹ [1916] 1 K.B. 541, 556.

² See, however, (b) in text following next paragraph. When a right of action has accrued against an enemy, the suspension is more procedural than substantive.

³ (1857) 7 El. & Bl. 779, 783.

⁴ *Supra*.

⁵ Bullen and Leake, *Precedents of Pleadings*, 3rd ed. (1868), p. 475 (n.).

⁶ (1799) 1 C. Rob. 196, 201.

⁷ Above, pp. 74-81.

outbreak of war or not;¹ if no writ has been issued, some means of substituted service must be found, and the facilities afforded for this purpose in the War of 1914 to 1918 by the now repealed Legal Proceedings against Enemies Act, 1915, were not renewed, except in so far as a rule of the Supreme Court, Order IX, r. 14B, which came into force on October 31, 1941, enabled the Court to dispense with service.² It is suggested that the injured party is in no way compelled to sue the enemy during the war; that would be unfair because in many cases it might be more difficult to procure the evidence required to substantiate his claim than in time of peace.

Cessation of interest. Assuming the right of action suspended to concern a debt or other claim which normally carries interest, will interest run during the war and be recoverable upon its conclusion?

This subject was very fully considered in the year 1909 in an article in the *Law Quarterly Review*³ by Mr C. N. Gregory entitled 'Interest on Debts during War', wherein, after an examination of both English and American decisions, the conclusion arrived at is that where debtor and creditor are separated by the line of war, interest ceases to run during the war whether the obligation to pay interest is express or implied by law. The Trading with the Enemy Amendment Act, 1914, section 2, provided that any interest which would have been paid to an enemy but for the state of war should be paid to the Custodian to be preserved—a provision which appears to be comprised within the comprehensive terms of paragraph (a) of subsection 1 of section 7 of the Trading with the Enemy Act, 1939.

English Courts have not yet been called upon to examine the questions of principle involved in the running of interest during war, and there is little that can be said with confidence.⁴ Where interest runs from a particular time, such as the date of the failure to pay a bill of exchange upon presentation for payment or upon maturity, and the war makes it impossible or illegal at that date to pay the bill, interest will not run until the war is at an end, for during the war there was no breach of duty in not paying the amount of the bill.⁵ Probably the demand of a customer upon his banker for the payment to him of money in the hands of the banker is governed by this rule.

¹ *Robinson & Co. v. Continental Insurance Co. of Mannheim* [1915] 1 K.B. 155 (policy of insurance—pleadings closed before outbreak of war), approved by C.A. in *Porter v. Freudenberg* [1915] 1 K.B. 857, 880. ² See p. 71, above.

³ Vol. 25, pp. 297–316. See also Chadwick in 20 L.Q.R. (1904), pp. 167–185.

⁴ Section 2 of the Law Reform (Miscellaneous Provisions) Act, 1934, will require consideration.

⁵ *Biedermann v. Allhausen & Co.* (1921) 37 T.L.R. 662 (bills of exchange accepted before the outbreak of war and falling due during the war—holder in Germany, acceptor in England), followed in *M. V. Lohr v. M. V. Lohr* (1921) 37 T.L.R. 662.

English law protects a principal sum due to the enemy and helps a British or neutral subject to recover a principal sum due from the enemy, and 'it is difficult to see on what principle the interest is to be forfeited if private property is to be respected'.¹ Indirectly the matter was discussed in two English cases during the War of 1914 to 1918. In the first,² Younger J. directed that the Custodian of the British assets of an enemy company should pay interest upon debts upon which by contract interest should be allowed, and, the contract falling to be interpreted by German law and being certainly one which apart from war would carry interest, he declined to recognize and give effect to a German war ordinance purporting to cancel interest during the war on debts due to enemies of the German Empire. He based his refusal both on the ground that the ordinance was 'no part of the general German law, by which the parties to this contract alone agreed to be bound', and on the ground that the cancellation of interest was 'not conformable to the usage of nations'.³ In the second⁴—a partnership case—it was not necessary to give a direct answer to the question of interest under discussion, but the decision that an enemy partner is entitled to some allowance (which presumably may take the form either of interest or a share of the profits) in respect of the use by the non-enemy partner of the assets of the firm during the war, would seem to shew that there is nothing in English law repugnant to the idea of an enemy creditor receiving interest when he ultimately receives his debt. Several of their lordships appeared to take the view that no difference in principle exists between the payment of interest and the payment of a capital sum. The two earlier English cases, *Wolff v. Oxholm*⁵ and *Du Belloix v. Lord Waterpark*,⁶ are not of much help, although in the latter case there are some remarks by Lord Tenterden C.J. which, though not necessary to the decision, are worth quoting:

'But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill whilst the plaintiff was an alien enemy.'⁷

¹ Per Lord Finlay L.C. [1918] A.C. at p. 245.

² *In re Fried Krupp Actien-Gesellschaft* [1917] 2 Ch. 188, 193, 194.

³ Citing *Wolff v. Oxholm* (1817) 6 M. & S. 92.

⁴ *Hugh Stevenson & Sons v. Aktien gesellschaft für Cartonnagen Industrie* [1918] A.C. 239.

⁵ (1822) 1 Dow. & Ry. 16, 19 (italics mine).

⁶ (1817) 6 M. & S. 92.

⁷ There is also a Bombay case, cited in Campbell, *Law of War and Contract* (1918), *Padgett v. Jamshedji Hormusji Chothia*, 18 Bom. L.R. 190, but it does not throw much light on our problem.

The American authority is not clear but leans in a direction contrary to the rule which we have inferred from the two modern English decisions. In *Hoare v. Allen*¹ it was held by the Supreme Court of Pennsylvania that interest on a loan ceased to run during a war, debtor and creditor being separated by the line of war: 'where a person is prevented by law from paying the principal, he should not be compelled to pay interest [accruing] during the prohibition...', that is to say, in an action brought after the war. Lord Finlay L.C. in the case cited above² rejects this decision.

The treatment of interest accruing during a war between persons separated by the line of war is a matter which ought to be regulated by the Peace Treaty. An example will be found in clause 22 of the Annex following Article 296 of the Treaty of Versailles of 1919, which prescribes, in the absence of any other binding rate, that interest at five per centum shall run from the date of the outbreak of war (or the later date at which the principal fell due) until payment, but not upon any 'sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital'.³ The Treaties of 1947 with Italy, Roumania, Bulgaria, Hungary and Finland do not contain any provision of this kind.

C. CONTRACTS MADE BEFORE THE WAR BETWEEN THE BRITISH CROWN AND PERSONS WHO HAVE BECOME ENEMIES IN THE TERRITORIAL SENSE

There are many contracts which the British Crown might before the outbreak of war enter into with foreign corporations and individuals who by reason of the outbreak of war (or the subsequent occupation by the enemy of non-enemy territory) become enemies in the territorial sense; for instance, contracts with a foreign whaling company to buy its output for a period of years, with a foreign cotton-growing company to buy its crop for a period of years, with a foreign shipping company to take up its tonnage on charter for thirty-six months, with a foreign insurance company to re-insure all risks accepted by it in regard to ships operating or cargoes carried to or from

¹ (1789) 2 Dall. 102; and see *Foxcraft v. Nagle*, 2 Dall. 132; *Conn. v. Penn*, 1 Peters C.C. 496, 524; and *Brown v. Hiatts* (1872) 15 Wall. 177. The authorities are discussed by Hyde, § 614, and by Chadwick and Gregory in 20 and 25 L.Q.R. *loc. cit.* See, however, *Hicks v. Guinness* (1925) 269 United States Reporter 71; *Annual Digest*, 1925-1926, Case No. 335, though I have not been able to ascertain whether the parties were truly separated by the line of war.

² *Hugh Stevenson & Sons' case* [1918] A.C. 239, 245.

³ This is a very general and popular statement, and reference must be made to the Treaty for the descriptions of debts to which it applied and for many other

parts of the British Empire, with a foreign manufacturing company to supply to it all the bauxite required by it in return for a percentage of the aluminium manufactured by it, a concession to a foreign company to work minerals on Crown land, etc. When the effect of the outbreak of war (or a subsequent occupation of non-enemy territory by the enemy) is to convert the foreign corporation into an enemy in the territorial sense, what is the position of such a contract?

Three preliminary points must be cleared out of the way.

(i) Subject to the Attorney-General's fiat being obtained, a petition of right is available to a foreign corporation,¹ though not of course during a war in which the suppliant is an enemy in the territorial sense.

(ii) The answer to our problem in some cases may be found by ascertaining what is the proper law of the contract; for if the proper law of the contract dissolves the contract the inquiry is answered. In determining what that law is, the Court will follow the general principles of the English rules upon the conflict of laws, namely, that 'it depends upon the intention of the parties either expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances'.² The House of Lords has recently rejected the contention (based upon a dictum of Lord Romilly M.R. in *Smith v. Weguelin*³) that when the British Government makes a contract which involves performance in a foreign country it must be presumed that the law of England is intended by the parties to be the proper law of the contract because only in England can the British Government be sued unless it submits to the jurisdiction.⁴ In the words of Lord Atkin,⁵ 'in every case whether a Government be a party or not the general principle which determines the proper law of a contract is the same'.

(iii) But when the application of the proper law of a contract would involve a judgment against a party for not doing something which is contrary to the rules of English law based upon public policy⁶ (of

¹ See *Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, 297, and as illustrations see *Rederiaktiebolaget Amphitrite v. The King* [1921] 3 K.B. 500; *Rex v. International Trustee for the Protection of Bondholders Aktien-Gesellschaft* [1937] A.C. 500.

² Per Lord Atkin in *Rex v. International Trustee, etc.* [1937] A.C. 500, 531.

³ (1869) L.R. 8 Eq. 198, 213.

⁴ Even in England there must be a technical assent by the Crown to the petition of right.

⁵ See note 2 above.

⁶ *Dynamit Aktien-Gesellschaft v. Rio Tinto Co.* [1918] A.C. 292; Dicey, *Exception 1 to Rule 160*: 'A contract (whether lawful by its proper law or not) is invalid [in England] if it, or the enforcement thereof, is opposed to English interests of State, or to the policy of English law, or to the moral rules upheld by English law.'

which the prohibition of intercourse with the enemy is typical), the proper law must give way to the positive rule of English law.

Clearly it would be beyond the scope of this work to consider the numerous proper laws which might govern a contract with the British Crown of the kind suggested. We shall accordingly confine our inquiry to considering the questions (1) whether, assuming the proper law of the contract to be English law, the contract is dissolved, and (2) whether, assuming that the proper law of the contract (being other than English law) does not dissolve the contract, English law precludes the success of a petition of right against the Crown. If the British party were a private individual or a corporation, the contracts instanced¹ would be dissolved under English law upon the other party becoming an enemy in the territorial sense, whether the proper law is English law or some other system of law which does not dissolve such a contract.² But it does not follow that the effect is the same when the British party is the Crown.

Let us look at three grounds upon which war can operate to dissolve a contract.

(a) *Intercourse with the enemy.* It is not unlawful for the Crown to contract, or hold other intercourse, with persons who are enemies in the territorial sense.³ The Crown may license intercourse with the enemy, and what the Crown may license others to do it can do itself.⁴ Whatever may be the underlying basis of the English rule which prohibits intercourse with the enemy—be it the danger of leakage of information or the procedural disability of the enemy—we are aware of no rule of law which prohibits the Crown from having intercourse with the enemy, and, that being so, we find it difficult to say that a contract involving intercourse between the Crown and an enemy in the territorial sense is for that reason *ipso facto* dissolved upon the outbreak of war or upon the other party becoming such an enemy. All the contracts instanced above, if a British subject or other private person in this country were a party instead of the Crown, would belong to the category of contracts dissolved by the outbreak of war, either because

¹ With the possible exception of the concession.

² *Dynamit Actien-Gesellschaft v. Rio Tinto Co.* (*supra*).

³ In the sphere of International Law opposing belligerent States can enter into binding agreements during war, and there are certain pre-war treaties which continue to be binding upon them: McNair, *Law of Treaties*, chap. 44.

⁴ The Trading with the Enemy Act, 1939, does not apply to the Crown (see section 16), but in practice the Crown has in general followed the provisions of the Act in regard to dealings with enemies, except in accordance with arrangements made with Allied Governments concerning allied nationals in enemy-occupied territory.

their performance involves intercourse with the enemy during the war, or because the suspension of performance until after the war would confer the present value of a post-war benefit upon the enemy within the *ratio decidendi* of the *Ertel Bieber* case; though it is arguable that the concession to work minerals is a 'concomitant of the rights of property' and survives the war unless confiscated by the Crown by the appropriate procedure during the war.

(b) *Increasing the enemy's resources or diminishing our own.* Can it be said that, 'the presumed object of war being as much to cripple the enemy's commerce as to capture his property',¹ the Crown may lawfully repudiate any contract on the ground that its performance would tend to enrich the resources of the enemy and facilitate his prosecution of the war against us? It is submitted that the answer is in the affirmative. It seems fantastic to suppose that after the war an English Court would award damages against the Crown on a petition of right for doing during the war the very thing which the law enjoins upon the subjects of the Crown, namely, to treat the contract as dissolved. Having regard to the development, at any rate since *Esposito v. Bowden*, of the factor of the increase of the enemy's resources and the crippling of our own as a dominant ground for the invalidity of contracts, as illustrated by the *Ertel Bieber* and many other decisions, we cannot believe that a contract with the Crown the performance of which would have this tendency, would survive the fact of the other party becoming an enemy in the territorial sense.²

(c) *Frustration* is the third ground requiring consideration. It applies to a Crown contract with the same force as to a contract with a subject. Frustration depends upon the particular circumstances of each case, and a generalization is not possible. But it seems probable that all the contracts instanced (though perhaps not the concession) are frustrated by the outbreak of a war making the foreign party an enemy, either because they were made upon the assumption understood by both parties that the inducement of the British Government to make them was to supply itself with commodities or services essential to the preparation for and the waging of a war, or

¹ Per Willes J. in *Esposito v. Bowden* (1857) 7 El. & Bl. 763, 779.

² Moreover, the Crown has power by 'inquisition of office' to confiscate the property of enemies, including their contractual rights, so that it could discharge the contract by vesting the other party's rights in itself. In the case of *In re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107 (C.A.), it was held that the Trading with the Enemy Acts of the last war had temporarily put this right into abeyance; but section 16 of the Trading with the Enemy Act, 1939, states that 'This Act shall be without prejudice to the exercise of any right or prerogative of the Crown'.

to prevent them from falling into the hands of a probable enemy for a like purpose—both of which objects have become impossible of attainment—or because their enforcement after the war would be to impose upon the parties a new and totally different contract.

We are not aware of any relevant English authority. The decision given in *Rosenstein v. German State and the State of Hamburg*¹ (contracts with a Rumanian who later became an enemy, for the dredging of canals in Germany) by the Germano-Rumanian Mixed Arbitral Tribunal in 1930 does not help us.

D. CONTRACTS WHICH IT IS ATTEMPTED TO MAKE DURING WAR

At common law any contract of the two following kinds which it is attempted to make during a war would (in the absence of licence from the proper authority) be void for illegality (apart from the criminal aspect): (a) contracts between any person, of whatever or of no nationality, who is in, or is carrying on business in, British or allied territory, and an enemy in the territorial sense: (b) contracts between any persons, wherever they may be and whatever their national status may be, which involve any person who is in, or is carrying on business in, British or allied territory, in intercourse with an enemy in the territorial sense. By the Trading with the Enemy Act, 1939, as amended by Defence Regulations, any contract which involved 'trading with the enemy' in the wide sense thereby defined, would be void for illegality and would involve criminal liability.

Lord Stowell's observations in *The Hoop* have already been quoted.² To them we may add the statement of Burrough J. in *Willison v. Patteson*:³ 'No contract can be enforced in a court of British judicature, which is made during the war, and which is made by an alien enemy.' That this rule is not confined to commercial transactions is clear from the judgment of the Court of Appeal in *Robson v. Premier Oil and Pipe Line Co.*⁴ (As to allied nationals and territory, see later, p. 174.)

¹ *Décisions des tribunaux arbitraux mixtes*, x, p. 122; *Annual Digest*, 1929-1930, Case No. 283.

² P. 87.

³ (1817) 7 Taunt. 439, 450 (bill of exchange).

⁴ [1915] 2 Ch. 124, 136, adopted by Lord Dunedin [1918] A.C. at p. 268.

E. CONTRACTS BETWEEN PERSONS IN FOREIGN NON-ENEMY COUNTRIES AND ENEMIES IN THE TERRITORIAL SENSE

In the nature of things these contracts are less likely to come before an English Court than those one party to which is in this country, but this can happen and the case must be discussed.

(a) *Where the non-enemy country is a co-belligerent ally*¹ of His Majesty, our Courts will visit allied nationals with the consequences of intercourse with the enemy in the same way as persons in this country.² Thus in *The Panariellos*³ the Judge of the Prize Court (Sir Samuel Evans, P.), in condemning the property of a French company which (though in good faith) had had commercial intercourse with the enemy immediately after the outbreak of war in connexion with a pre-war contract of sale of the cargo seized as prize, stated the rule to be that where the

'illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts.'

Again, in an action brought by a Belgian firm carrying on business in Antwerp and London upon a pre-war contract with a German carrying on business at Hamburg and, before the war, in London, Bray J. held that there was no breach of the contract, as it became illegal and was dissolved by the outbreak of war. It was just as illegal for the nationals of an ally to have intercourse with the enemy as it was for British subjects.⁴

(b) *Where the non-enemy country is neutral*, a distinction must be made between (i) a contract which involves conduct inimical to the interests of this country and assistance to our enemy of a kind which international law entitles a belligerent to prevent and punish, though by the law of his own country the neutral national may lawfully

¹ It should be noted that co-belligerents are not always allies, and that an ally is not necessarily belligerent. In the course of the War of 1914 to 1918 the United States of America became 'associated' with us in the war, and in the Treaty of Versailles are described as an 'Associated Power'. In the recent war Soviet Russia was our ally at any rate as from July 15, 1941; see *The Times* newspaper, July 16, 1941.

² Except criminally.

³ (1915) 31 T.L.R. 326; affirmed (1916) 32 T.L.R. 459.

⁴ *Kreglinger & Co. v. Cohen, Trading as Samuel and Rosenfeld* (1915) 31 T.L.R. 592. But this decision is possibly weakened by the fact that the Belgian firm was also carrying on business in London.

render it,¹ that is, the carriage of contraband to our enemy, the breach of a blockade declared by us (including, presumably, the analogue of a blockade imposed by Retaliatory Orders in Council), or the rendering of unneutral service, and (ii) a contract which is devoid of such offence.

(i) During the recent war against Italy a Barcelona merchant sold and shipped a contraband cargo to an importer in Genoa. After the war one of the contracts pertaining to this transaction—sale, affreightment, or insurance—might come before an English Court if the importer established a branch within the jurisdiction of the English Courts. It is inconceivable that they would enforce that contract, though it was perfectly lawful by the laws of Spain and Italy.

(ii) But suppose a war between Great Britain and Italy in which the port of Genoa is neither blockaded by us nor within the ban of a Retaliatory Order in Council, and suppose a non-contraband consignment of Spanish guitars shipped from Barcelona to Italy. Would an English Court treat the contract as illegal? Not on the ground of trading with the enemy, because that is only prohibited to persons in this country, to allied nationals and (probably) to any person in an allied country. On the ground that it enriches the enemy's resources? Probably not, because it does not enrich his war potential and it takes money or credit away from the enemy country. An enemy party could not enforce it in an English Court during the war because he would be defeated by the plea of alien enemy, but it is difficult to see why his ex-enemy status should defeat him after the war.

(iii) Again, suppose that during the recent war against Italy a Barcelona merchant enters into a contract with an Italian shipowner which involves performance in England *after* the war—for instance, the charter of Italian ships to carry a series of cargoes to England after the war. Would an English Court, after the war, treat this contract as void because at the time of its making Great Britain was at war with Italy? Possibly, on the ground of the doctrine enunciated in the *Clapham Steamship* case² and the *Ertel Bieber* case³ to the effect that it enhances the resources of the enemy prospectively, that is, by ensuring to him the post-war employment of his mercantile marine, which has a present value for him.

¹ The law administered by the Prize Court permits the neutral national whom the outbreak of war finds with a commercial domicile in an enemy country a reasonable *locus poenitentiae* in which to dissociate himself from the enemy: see *The Anglo-Mexican* [1918] A.C. 422 and *Part Cargo ex M.V. Glenroy* [1945] A.C. 124.

² [1917] 2 K.B. 639.

³ [1918] A.C. 260.

F. CONTRACTS BETWEEN PERSONS IN THIS COUNTRY AND
ENEMY NATIONALS IN FOREIGN TERRITORY NEITHER
OWNED NOR OCCUPIED BY THE ENEMY POWER

Where one of the parties to a contract is an enemy national living in foreign non-enemy territory, and the other is a person resident or carrying on business in this country, there is some authority¹ for saying that, though the enemy national is not living under the protection of the King, he can enforce the contract, whether made before or during the war, in an English Court. If an enemy national so situated has a right to sue in an English Court, it is a reasonable deduction that he has contractual capacity.² But an enemy in foreign non-enemy territory who is 'black-listed' by the Board of Trade under subsection 2 of section 2 of the Trading with the Enemy Act, 1939, would not have contractual capacity under our law.

G. CONTRACTS MADE BETWEEN PERSONS IN ENEMY
TERRITORY DURING WAR

(A) Where neither party is a prisoner of war or interned or detained:

- (i) between two British nationals;
- (ii) between a British national and the national of a neutral State;
- (iii) between a British national and an enemy national;
- (iv) between two enemy nationals;
- (v) between an enemy national and a national of a neutral State;
- (vi) between two nationals of a neutral State or States.

(B) Where one or both parties are prisoners of war or interned or detained by the enemy.

We must rid our minds of the idea that a contract made in enemy territory during war is by reason of that mere fact one that can never

¹ *In re Mary, Duchess of Sutherland, Bechoff, David & Co. v. Bubna* (1915) 31 T.L.R. 248; *ibid.* 394 (C.A.); see above, p. 49.

² There is an American expression 'separated by the line of war', which supposes an imaginary cordon to be drawn round enemy and enemy-occupied territory and is used to distinguish contracts to which both the parties are outside such territory from contracts to which one party is within such territory and the other outside it. There is good reason to think that the 'line of war' runs round enemy and enemy-occupied territory and not round British and British-occupied territory, so that foreign non-enemy territory would lie on our side of the line. The idea is implicit in many of the English decisions, and occasionally the expression 'line of war' is found. Lord Wright uses it in the *Soufracht* case [1943] A.C. 203, 230.

be enforced in an English Court;¹ it depends also on the status of the parties and the content of the contract.

The mischiefs aimed at by the rule of law that renders void a contract which it is attempted to make with a person in enemy territory, namely, communication across the line of war, and (less certainly) the increase of the enemy's resources, do not exist when both parties are in enemy territory.

(A) *Where neither party is a prisoner of war or interned or detained by the enemy*

We shall leave to the next section (B) cases in which one or both of the parties are prisoners of war in the strict sense or interned by the enemy or merely prevented from leaving enemy territory. Few British nationals in enemy territory would fall outside those categories, but in many wars British nationals, particularly women and elderly men, have voluntarily remained in enemy countries after having the opportunity to leave.

(i) *Between two British nationals.* Two British nationals, voluntarily resident in enemy territory, during the war enter into a contract which is innocent in itself and in no way prejudicial to British interests, e.g. for instruction in playing the piano, for the loan of money. We can see no reason why an English Court if asked to adjudicate upon the contract after the war, or after both parties have departed from enemy territory, should not do so subject to the normal rules of conflict of laws.

(ii) *Between a British national and the national of a neutral State.* We suggest that the view expressed in the preceding paragraph also applies to a contract between these persons. In *Houriet v. Morris*² Swiss (neutral) subjects were allowed to sue a British subject during the war with France as the payees of a promissory note given to them by the defendant in France during the war in payment for goods bought there. Lord Ellenborough said:

'The contracting parties were not alien enemies; and it does not follow that the contract was void, though made in an enemy's country. The plaintiffs, who are domiciled in Switzerland [*sic*], might lawfully sell their goods in Paris; and it is not proved that the defendant, who is a British subject, purchased them there for any illegal purpose.'

¹ *Houriet v. Morris* (1812) 3 Camp. 303; see also Dallas J. in *Antoine v. Morshead* (1815) 6 Taunt. 237 ('this is a contract between two subjects [*scilicet*, British subjects] in an enemy's country, which is perfectly legal').

² *Supra*.

(iii) *Between a British and an enemy national.* Is such a contract, if it is innocent in itself and in no way strengthens the resources of the enemy or injures British interests, a trading with the enemy, and therefore criminal? At common law? No, unless it involves treasonable activities; because apart from a few exceptional crimes, such as treason, murder, manslaughter, bigamy, piracy, etc., our conception of crime is territorial.¹ Under the Trading with the Enemy Act, 1939? No; because that Act applies not to British nationals as such but to any 'person' in the United Kingdom, or, if extended by Order in Council, to certain other territories which are British or under British protection or mandate or jurisdiction.² We suggest, therefore, that it is neither criminal nor illegal for a British national in enemy territory to contract with an enemy national for such purposes as the giving of music lessons or the purchase of food or books, and that such contracts would be enforced in English Courts after the war subject to the normal rules of conflict of laws. But a contract involving treasonable activities would be both criminal and illegal, and one can imagine many contracts which, while not amounting to treason, would by reason of their tendency to maintain the enemy's trade and resources be treated after the war by an English Court as contrary to English rules of public policy and unenforceable.

(iv) *Between two enemy nationals.* Two enemy nationals during the recent war enter into a contract in Berlin which has no connexion with the war and neither injures Great Britain or her allies or assists the enemy—a qualification which would probably exclude most commercial transactions; for instance, Herr X and Herr Y agree that the former shall publish the next novel written by the latter; after the war Herr X establishes his residence in London and Herr Y sues him in an English Court for breach of contract. The contract does not offend against rules of English public policy, and we can see no reason why it should not be enforced in England, subject to the normal rules of conflict of laws. In *Ottoman Bank v. Jebara*,³ the House of Lords after the war upheld a transaction, the delivery of goods in return for payment of bills of exchange, between enemy nationals in enemy territory during the war. Lord Shaw,⁴ speaking of Syria, said: 'Both bank and customer

¹ Kenny, *Outlines of Criminal Law* (15th ed.), p. 489.

² This statement is believed to be consistent with Dicey's Rule 156; and see note 9 on p. 174 below. On the other hand, the Treachery Act, 1940, applies to anything done by a British subject 'elsewhere than in a Dominion, India, Burma or Southern Rhodesia', or 'by any person subject to the Naval Discipline Act, to military law or to the Air Force Act, in any place whatsoever'.

³ [1928] A.C. 269.

⁴ At p. 280; see also Lord Dunedin at p. 276. In *Evans v. Richardson* (1817) 3 Mer. 469, which arose upon a contract made in the United States of America

were Turkish subjects there; and the legitimacy of the payment to the bank in Beyrout is, therefore, beyond question, there being no international quality about that part of the transaction.'

(v) *Between an enemy national and a national of a neutral State.* The view expressed in the preceding paragraph applies also to such a contract.

(vi) *Between two nationals of a neutral State or States.* Again, we suggest that the view expressed in paragraph (iv) applies to such a contract. Moreover, the question could arise during the war. In 1940 two American citizens resident in Berlin entered into a contract of an unobjectionable character. In 1941 they left Germany and established their residence in London. Can they sue one another for breach of contract, e.g. a loan of money? We suggest that, subject to the conditions described in paragraph (iv), the contract is enforceable during the war. Any contract which tended to strengthen the trade and resources of the enemy would be unenforceable in England both during and after the war.

(B) *Where one or both parties are prisoners of war or interned or detained by the enemy*¹

We have already considered² the converse case of enemy prisoners of war, and enemy persons interned, in this country, and we noticed that they appear to possess full contractual and (apart from the writ of *habeas corpus*) procedural capacity; in *Sparenburgh v. Bannatyne*³ there is a suggestion that they must be allowed the degree of legal status necessary to enable them to subsist. Judicial authority upon the position of contracts made by prisoners of war and persons interned or detained in enemy territory is not clear. It is submitted that the position of their contracts is at least as favourable as that of the contracts of other British nationals, which we have already attempted to describe, and in one respect much more favourable. There is considerable authority for the view that a contract connected with the object of supplying such a person with the necessities of life may be enforced in English Courts after the war even though it involved intercourse during the war between a person in enemy territory and a person in

during war with Great Britain, the parties are described as 'citizens of the United States of America', the plaintiff as 'a native of America usually resident there', the defendant as 'a Scotchman usually resident in England' (probably a double national). No objection was based on the fact that the contract was made in the enemy country, but the Court declined on other grounds to grant the relief sought.

¹ As to limitation of actions, see Limitation (Enemies and War Prisoners) Act, 1945, in Appendix V, p. 448.

² Above, pp. 54-60.

³ (1907) 1 Bos. & P. 162.

this country. In *Antoine v. Morshead*¹ a British prisoner of war² in France drew a bill of exchange in 1806 during the war with France upon a British subject in this country in favour of another British prisoner of war in France, who thereupon indorsed it during the war to a French banker in France, as the only, or the obvious, way of making use of it; it was accepted by the defendant (described as 'resident here') and almost certainly during the war. After the war the French banker sued the defendant upon the bill and succeeded in spite of the plea that what he sued upon was a contract made with an enemy in time of war. In *Duhammel v. Pickering*³ a bill drawn by a prisoner of war in favour of an alien enemy was regarded as void, but apparently by reason of a statute of 1794 which expired in 1800. In *Daubuz v. Morshead*⁴ a bill of exchange was drawn during the war by a British prisoner of war in France, accepted by his son (almost certainly during the war and probably in this country), in favour of an enemy payee, who indorsed it to the plaintiff, who was allowed to recover upon it from the acceptor after the war, without prejudice to the question 'whether the Crown might or might not lay hands on it'.

In *Crawford & McLean v. The William Penn*,⁵ a Washington Circuit Court, after the war, allowed an ex-enemy to enforce a bottomry bond entered into during a war by the master of an American cartel ship in an enemy port in order to enable him to refit and victual his ship for the purpose of bringing home American citizens who were prisoners of war. The judgment was based on *Antoine v. Morshead* and other English decisions mitigating the strict rigour of the law in the interests of prisoners of war. In an earlier stage of the case⁶ it was said that a cartel amounts to a licence by both belligerents 'to perform the service in which [the ship] is employed, and sanctifies all the means necessary to that end'.⁷

¹ (1815) 6 Taunt. 237. I do not find the report clear; in any case it is clear that the Court was influenced by the humanitarian object of supplying the needs of a British prisoner of war, and later in *Willison v. Patteson* (1817) 7 Taunt. 439 Gibbs C.J., who presided in *Antoine v. Morshead*, said (p. 447) that 'the case was an accepted case, and did not come within the general rule'.

² In *Duhammel v. Pickering* (1817) 2 Stark. 90 counsel described the two prisoners of war in *Antoine v. Mostyn* (meaning *Morshead*) as *detenus*; he is reported to have spoken of drawer and drawee but probably referred to drawer and payee.

³ *Supra*.

⁴ (1815) 6 Taunt. 332; apparently the drawer was the same person as in *Antoine v. Morshead*, and therefore a *detenu*, and the defendant the same person as in that case.

⁵ (1819) 3 Washington Circuit Court 484.

⁶ 1 Peters C.C. 106.

⁷ As to the giving of Powers of Attorney by British prisoners of war, see Execution of Trusts (Emergency Provisions) Act, 1939; Evidence and Powers of Attorney Acts, 1940 and 1943; and Armed Forces (Administration of Oaths) Order, 1940 (S.R. & O. 1940, No. 1224 (L. 15)). See also S.R. & O. 1942, Nos. 571

NOTE ON MEANING OF RIGHTS OF ACTION ALREADY ACCRUED
UPON THE OUTBREAK OF WAR, WITH SPECIAL
REFERENCE TO DEBTS¹

We have seen that while an enemy (in the territorial sense, in which sense we shall use the term in this Note) may be sued during the war upon a right of action already accrued (if service of a writ of summons or the equivalent of service can be effected), the enemy plaintiff is not allowed to sue in an English Court until the war is over. These rules apply with certainty to rights of action for damages for breach of contract, and a number of decisions to that effect have already been cited. It is further submitted that there is no reason why they should not apply to rights of action in tort. (See below, p. 124.)

What is the position of a debt, and what exactly is meant by a debt? Does it mean an accrued right of action to sue at once for a liquidated sum of money? Or does it include an obligation to pay in the future a liquidated sum of money (*debitum in praesenti solvendum in futuro*), e.g. after a demand or at a date which has not yet arrived, so that the right of action is not yet complete? This is a vital question.

Before the outbreak of the recent war on September 3, 1939, Brown in England had borrowed from Schmidt, who was during the war in Germany, £100 repayable on December 31, 1939; under a pre-war contract for the sale of goods Brown owed Schmidt £100 for the price of goods sold and already delivered before the outbreak of war, payable on December 31, 1939; under a pre-war bill of lading or voyage charter Brown owed Schmidt £100 for freight already earned before the outbreak of war but not due until December 31, 1939. Do Schmidt's rights perish upon the outbreak of war, or are they merely suspended and enforceable after the war? It is submitted that principle and justice and the small amount of authority that exists all point to the correctness of the latter solution, namely, that the money can be recovered after the war, since Schmidt had done before the outbreak of war everything required on his part to make the money both due and payable as soon as the necessary period of time has elapsed.

By English law, as we have already seen, the outbreak of war does not automatically involve the confiscation of private enemy property in this country, though the Crown may by inquisition of office bring about a forfeiture, or Parliament may produce this effect by legislation. A debt is essentially a piece of property, and it is worth remembering that the action of debt was in origin a recuperatory action, the theory

being that the defendant was wrongfully retaining the plaintiff's property (see Maitland, *Forms of Action* (edition of 1936, p. 63)).

We are not aware of any decision in which the Court was compelled to decide, as a question of principle, what is the meaning of 'debt' in this respect, and where the line must be drawn between a 'debt' which survives the outbreak of war and those other obligations which are destroyed by the outbreak of war; in short, what is precisely meant by the rule that most contracts remaining executory upon the outbreak of war (one party being an enemy) are thereupon abrogated. The decisions given by the Mixed Arbitral Tribunals upon the expression 'any debt or other pecuniary obligation' occurring in Article 299 (a) of the Treaty of Versailles of 1919 do not afford a conclusive answer to these questions, because in a treaty of peace the high contracting parties may, and usually do, aim by stipulation to produce effects which but for the treaty would be absent, and the treaty, when transformed into law by methods appropriate to the countries of the contracting parties, binds their nationals. We are, therefore, driven to find an answer by somewhat indirect means.

In *Seligman v. Eagle Insurance Co.* [1917] 1 Ch. 519, where a person who later became an enemy had borrowed money from an insurance company and had insured his life with that company and paid the premiums, assigning the policies to the company to secure the loan, Neville J. did not treat either the contract of loan or the covenant to pay the premiums as dissolved by the outbreak of war, though both were executory in the sense that something remained to be done; the instalments of principal and the interest due upon the mortgage and the premiums due upon the policies had been paid down to the outbreak of war, and what remained was the future payment of instalments, interest and premiums and the eventual repayment of the loan and, conversely, payment of any balance of the sum insured not required to wipe off the amount of the loan. Though there may be a doubt about the interest (see above, p. 105) all these obligations, though *in futuro*, were treated as subsisting, except that any right of action that might accrue to the policy-holder or his executors during the war could not be enforced during the war. In *Continental Tyre and Rubber Co. v. Daimler Co.* [1915] 1 K.B. 893, 894; [1916] 2 A.C. 307 'the plaintiff company was the drawer and holder of bills accepted by the defendants for goods supplied before the declaration of war. The bills matured for payment and were presented *after the declaration of war*' (*italics mine*). It was never suggested in that well-fought case that the outbreak of war abrogated the obligation to meet the bills because they had not matured; the obligation was regarded as a debt, and the

question was whether the plaintiff company's right to sue for the debt could be defeated by the plea of alien enemy. In the bracketed action, *The same v. Thomas Tilling Ltd.*, reported at the same place, the debt arose upon a balance of account for goods shipped before the outbreak of war and was presumably payable before the war. It must be remembered that a banker is a debtor to his customer for any sum standing to the credit of his customer on current or deposit account, though that sum is not payable to the customer until he demands it and (in the case of a deposit account) any agreed period of notice elapses. It is inconceivable that upon the outbreak of war an English banker's obligation towards an enemy customer is *ipso facto* destroyed. (*Clare & Co. v. Dresdner Bank* [1915] 2 K.B. 576 and *Leader v. Direction der Disconto Gesellschaft* [1915] 3 K.B. 154 are cases of enemy banks and do not help us.)

When we turn to the Trading with the Enemy Act, 1939, section 7, and the Order made thereunder by the Board of Trade (S.R. & O. 1939, No. 1198), prescribing the money which is made payable to the Custodian, and in particular Article I (ii) (e) and (iv) (c), we find that money becoming payable to an enemy after the outbreak of war is included therein. Article I (ii) (e) makes payable to the Custodian any 'debt, including money in the possession of any bankers, whether on deposit or current account or whether held in trust or in custody for or for the benefit of an enemy', and Article I (iv) (c) requires any money so required to be paid to the Custodian to be paid '... within fourteen days after the day on which the money becomes payable or would, but for the existence of a state of war,¹ become payable'. These provisions support the view that there are some debts which, though not payable immediately upon the outbreak of war, survive that date, are not destroyed thereby, and would be recoverable by the enemy after the war in the absence of any arrangements having a contrary effect.

In conclusion, it is submitted that where as a result of a pre-war contract there has accrued due to a party who becomes an enemy a liquidated sum of money, whether already payable to him when war broke out or becoming payable to him during the war, the right to that payment is merely suspended during the war and, in the absence of arrangements to the contrary made either during the war (including forfeiture by inquisition of office) or in consequence of the Peace Treaty, is enforceable in our Courts by the ex-enemy when the war is at an end.

¹ It is only for the purpose of deciding whether the money is payable to the Custodian that the state of war is disregarded, and the expression 'but for the existence of a state of war' is not intended e.g. to save from dissolution a contract of a kind which the outbreak of war dissolves.

CHAPTER 5

CIVIL STATUS OF ENEMIES OTHER THAN PROCEDURAL AND CONTRACTUAL

We have dealt in preceding chapters with the *procedural* and the *contractual* status of enemies, both those who are within the King's protection and those who are not. It remains to consider the residue of their civil status.

The enemy within the King's protection (and, probably, the enemy in an allied or neutral country) would seem to have complete civil status.¹ He may make valid contracts; he can acquire rights of action in tort and become liable in tort; he can acquire and dispose of real and personal property, *inter vivos* or by will, and he can take property upon an intestacy. He does not lose this status by internment, at any rate if it be in pursuance of a general policy.²

The position of the enemy in the territorial sense (the sense in which we shall use the term throughout the remainder of this chapter unless another sense is indicated), that is, the person who is voluntarily in enemy territory, whether resident or not, or who is carrying on business there, is different. We shall discuss his status under the following headings:

- A. Torts.
- B. Holding, Acquisition and Disposition of Property *inter vivos*.
- C. Wills and Intestacy.
- D. Domestic Relations.

A. TORTS

(i) *As the victim of a tort.* (a) *Pre-war torts.* We have already seen that rights of action which have already accrued to an enemy before the outbreak of war are suspended and unenforceable by him in the Courts of this country until after the war. We are not aware of a reported decision upon a right of action in tort³ but see no reason why it should not be subject to the same rule as that which governs a right of action in contract, of which there are many illustrations.

It is true that the history of the development of the law of torts is a history of remedies rather than of rights: *ubi remedium, ibi jus*. But

¹ Except that, when a prisoner of war or interned, a writ of *habeas corpus* is not available to try the issue of his liberty; see above, pp. 54-60.

² See above, pp. 57, 58.

³ For the case of a registered enemy plaintiff in action of tort, see above, p. 42.

this undoubted historical fact must not be allowed to obscure the fact that a right of action for the redress of an injury recognized by English law as tortious is a chose in action, a piece of property. For instance, in 1938, X, a person resident in Germany, is libelled in a single issue of a newspaper published in London.¹ War breaks out between Great Britain and Germany on September 3, 1939, and X continues voluntarily to remain in Germany throughout the war. During that period his right of action exists but is in suspense, in the same way as pre-war debts and accrued rights of action for breach of contract. During that period he is capable of owning the right of action, and, when the period is past, we can see no reason why he should not be able to enforce it.² (We need not again discuss the question of the Limitation Act, 1939.)³

(b) *Post-outbreak of war torts.*⁴ Suppose that an English newspaper during the war publishes the following false statement of an enemy: 'Herr Johann Schmidt, while enjoying the hospitality of our country during the past few years prior to his hurried departure, systematically abused it by employing his time in taking photographs of vital objectives, and Goering's Luftwaffe are now finding these photographs very useful.' Can Herr Schmidt after the war bring an action for libel against the editor and the proprietors of the newspaper? Why not? No intercourse with enemy persons or territory is involved in the acquisition of the right of action such as would be involved in the making of a contract between a person in this country and an enemy. If the enemy is capable of owning property during the war, including (as we submit to be the case) a pre-war right of action in tort, why is he not capable of acquiring a right of action in tort during the war? Let us see whether instances can be found of an enemy acquiring other rights of action during a war. If such can be found, it is some evidence in favour of the view that he is not incapable of acquiring a right of action in tort during the war.⁵ In *Halsey v. Lowenfeld* (Leigh and Curzon third

¹ The tort is thus complete, and no question of a continuing tort arises.

² Always assuming that the Crown has not confiscated it by due process.

³ See above, pp. 74-81.

⁴ Article 27 of the International Convention of July 27, 1929, relative to the Treatment of Prisoners of War, makes some provision for compensation for 'accidents at work'; see a note on this Convention later at p. 228.

⁵ In *Sylvester's Case* (1702) 7 Mod. 150 it was said by the Court of King's Bench: 'if an alien enemy come into England without the Queen's protection [and the alien enemy in the territorial sense is in much the same position in our Courts] he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here; but if he has a general or special protection, it ought to come of his side in

parties),¹ where an enemy lessee of a London theatre residing in Austria was held liable during the war upon a covenant to pay rent which fell due during the war, it was not doubted that he thereupon acquired a right of indemnity against a pre-war assignee of the lease; but it was held that he could not recover from him during the war under a third party notice because in that proceeding the defendant was an actor. In *Hugh Stevenson & Sons v. A.-G. für Cartonagen Industrie*,² where the outbreak of war dissolved a partnership between an English company and a German company and the former carried on the business during the war with the aid of the latter's share of the assets, the House of Lords held that the latter, an enemy, became 'entitled to a share of the profits earned since the dissolution, so far as attributable to the use of their share of the capital',³ though it could not be recovered during the war. Lord Atkinson said⁴ that 'the error underlying the argument presented in support of this appeal... is this, that the temporary suspension of the remedy is confounded with the permanent loss of the right'.⁵ It must not be assumed that, because an action can during the war be defeated by the plea of alien enemy, there can be no valid cause of action underlying it. Moreover, we shall find in sections B and C, which follow, a number of instances of enemies holding during the war other kinds of property, and even acquiring property during the war—at any rate when the acquisition does not involve the forbidden intercourse across the line of war. For these reasons it is submitted that, subject to any question of the limitation of actions,⁶ Herr Schmidt should succeed in his action after the war.⁷

(ii) *As a tort-feasor.* (a) and (b). Whether the tort is committed before or during the war, his enemy status affords no protection against an action brought against him during or after the war.

pleading'. I do not think that this statement can be said to be adequately considered authority against the accrual of a right of action in tort during war.

¹ [1916] 2 K.B. 707 (C.A.).

² [1918] A.C. 239.

³ At p. 240.

⁴ At p. 253.

⁵ A recent recognition of the distinction between substantive and procedural liability will be found in *Dickinson v. Del Solar, Mobile and General Insurance Co., Third Party* [1930] 1 K.B. 376: 'Diplomatic agents', Lord Hewart C.J. said at p. 380, 'are not... immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction.' That is to say, legal liability can coexist with temporary immunity from suit. If that is so, why cannot a legal right coexist with a temporary inability to enforce it?

⁶ See above, pp. 74-81.

⁷ For a libel action in a Chinese court brought by a German national held prisoner under suspicion of war crimes, see *The Times* newspaper, September 18, 1946. Whether he was resident in China or not, does not appear. And see, as to torts generally, P.H.W. in *Cambridge Law Journal*, vol. 9 (1945), p. 129.

B. HOLDING, ACQUISITION AND DISPOSITION OF PROPERTY *INTER VIVOS*

(i) *Holding property.* Can the enemy continue to own property, real and personal, which belonged to him when war broke out? Certainly, unless and until the appropriate steps are taken to deprive him of it, permanently or temporarily.

Considerable doubt attended this matter during the War of 1914 to 1918, mainly, it is suggested, owing to the confusion of certain distinct questions, namely, whether international law wrought or permitted the confiscation of enemy private property upon the outbreak of war, and the question whether English law contained any provision for that purpose, either upon a wholesale scale or in relation to particular persons. Some discussion of the relevant international law will be found in the second volume of Oppenheim, *International Law*,¹ and in the authorities cited there. So far as English law is concerned, the position is clear and may be summarized as follows: the outbreak of war does not *ipso facto* bring about the confiscation to the Crown of the private property of enemies either in the national or the territorial sense:² but the Crown may before the conclusion of peace resort to the ancient procedure of 'inquisition of office' and confiscate the property, including choses in action,³ of an enemy (including almost certainly an enemy only in the national sense). In the case of *In re Ferdinand, Ex-Tsar of Bulgaria*⁴ (an enemy in both senses) it was held

¹ § 102.

² Among other authorities for this statement see Lord Stowell in *The Neustra Senora de Los Dolores* (1809) Edw. 60; Lord Parker in *The Roumanian* [1916] 1 A.C. 124, 135 and in the *Daimler* case [1916] 2 A.C. 307, 347; Lord Finlay and Lord Haldane in *Hugh Stevenson & Sons'* case [1918] 239, 244, 247; Lord Birkenhead in *Fried Krupp v. Orconera Iron Ore Co.* (1919) 88 L.J. (Ch.) 304, 309; and see generally the notes in Oppenheim, *loc. cit.* It is difficult to reconcile *In re Ferdinand* with the passages referred to above except on the basis that they mean that there is no automatic confiscation of enemy private property.

³ *Attorney-General v. Weeden & Shales* (1699) Parker 267. This case is examined at some length by Farrer in 37 L.Q.R. (1921) at pp. 234 *et seq.*, from which it appears that the chose in action, which would probably have been forfeitable by inquisition of office if the inquisition had been held before the conclusion of peace, was a legacy given by the will of a naturalized British subject dying during the war (apparently in England) to an enemy national resident in enemy territory.

⁴ [1921] 1 Ch. 107 (C.A.); following a statement in *Porter v. Freudenberg* [1915] 1 K.B. 857, 869, 870; and see Farrer in 37 L.Q.R. (1921), pp. 218-241 and 337-362 for a criticism of the decision in *In re Ferdinand*. At the relevant dates in July and August 1919 the ex-Tsar was still an enemy; he was not 'within the protection of the King' and was probably living in Germany. It seems that the right of the Crown to confiscate the goods of enemies by means of inquisition of office applies whether the enemy is in this country, within or without the protection of the King, or abroad.

that this procedure was temporarily superseded and put in abeyance by the Trading with the Enemy Acts of the War of 1914 to 1918.¹ There is, however, at common law no automatic divesting of his property. He retains the capacity of holding the property which he owned on the outbreak of war; that is a necessary deduction from the rule that the title of the Crown must be found by inquisition of office before the conclusion of peace,² which means the conclusion of peace in the legal sense and not the mere suspension of hostilities by an armistice. Both *Attorney-General v. Weeden and Shales*³ and *In re Ferdinand* relate to personal property, but since aliens may now hold real property, it is difficult to see why the rule should not be the same in that case.⁴

Again, legislation may be passed which may affect the enemy's ownership and enjoyment of property in this country. The Trading with the Enemy Act, 1939, in this matter following in broad outline the Trading with the Enemy legislation of the War of 1914 to 1918, provides (section 7) that 'with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace', the Board of Trade may by order require the payment to the Custodian of Enemy Property of 'money which would, but for the existence of a state of war, be payable to or for the benefit of' an enemy as defined by the Act,⁵ and may vest in the Custodian such enemy property as may be prescribed.⁶

These provisions do not necessarily deprive the enemy irretrievably of his property but they take it out of his control and beneficial ownership for the time being.⁷ What will happen to the property upon the conclusion of peace remains to be seen.⁸

(ii) *Acquisition of property.* Can the enemy acquire during the war property situate in England? We suggest that the answer to this question is, Only when no illegal intercourse is involved in the acquisition. That

¹ See, however, for the recent war, the reservation of 'the exercise of any right or prerogative of the Crown by section 16 of the Trading with the Enemy Act, 1939.

² [1921] 1 Ch. at pp. 132, 139; citing *Attorney-General v. Weeden and Shales* (*supra*). See also *The Charlotte* (1813) 1 Dods. 212.

³ *Supra*.

⁴ *Contra*, Farrer in 37 L.Q.R. (1921), p. 347.

⁵ See above, p. 66.

⁶ Upon the similar legislation in the United States of America, see *Cummings, Attorney-General v. Deutsche Bank und Disconto Gesellschaft* (1937) 83 F. (2nd) 554; 300 U.S. 115.

⁷ *In re Münster* [1920] 1 Ch. 268; see below, p. 221.

⁸ A very brief summary of the treatment of enemy private property by the peace treaties which concluded the War of 1914 to 1918 will be found in Oppenheim, *loc. cit.*; and see Scobell Armstrong, *War and Treaty Legislation, 1914-1922*.

would seem to rule out the modes of acquisition which involve contemporaneous agreement, e.g. a purchase, or a gift involving present delivery; but a gift by deed is valid until it is declined, and might be in a different position. An enemy can acquire a legacy under the will, or a share upon the intestacy, of a person dying in England during the war, though he could not receive the property during the war, and in those circumstances it could be vested in the Custodian.¹ In two cases² where testators died during the War of 1914 to 1918 having made English wills, whereby they bequeathed the income of a trust fund in one case and annuities in the other to enemies, the intrinsic capacity of these enemies to take under the wills was not questioned; the argument turned upon the effect of the Trading with the Enemy Acts, the Peace Treaties, and the legislation passed to give effect to them. During the war, of course, they could not receive the sums which would otherwise have been due to them. What was the nationality of the testators and where they died does not appear.

In the case of *In re Neuburger's Settlement*,³ certain children, enemies, became entitled in possession upon their mother's death in July 1918 to a contingent interest in an annuity payable under their mother's marriage settlement and secured by the covenant of her parents with trustees—her parents and the trustees being all British subjects. Where the parents and the trustees were resident at the date of the mother's death does not appear, but it was probably in the United Kingdom. The children's interests were contingent upon attaining twenty-one years of age or marrying. It was held that upon their mother's death the children acquired 'a plain right and interest' in the trust fund fed by the covenant, but of course it went to the Custodian and was later caught by the charge created by the Treaty of Versailles. Their enemy status did not prevent them from acquiring the same interest in the fund as they would have acquired if they had not been enemies.

In the case of *In re Sanpietro*,⁴ where two enemies, both in the national and the territorial senses, had before the war become entitled to rever-

¹ *In re Jacob Schiff* [1915] P. 86; for exceptions to the general rule that a grant will be made to the Public Trustee, see *In re Grundt*; *In re Oetl*, *ibid.* 126; and see Tristram and Coote, *Probate Practice* (18th ed. 1940), pp. 1089, 1090; *In re de Barbe* [1941] W.N. 218; and *In re Wintke* [1944] Ch. 166.

² *In re Schiff, Henderson v. Schiff* [1921] 1 Ch. 149; *In re Levinstein, Levinstein v. Levinstein* [1921] 2 Ch. 251.

³ [1923] 1 Ch. 508. *In re Schulze* [1917] S.C. 400 it was held by the Second Division of the Scottish Court of Session that an enemy 'in protection', having complied with the requirements of the Aliens Restriction Act, 1914, could be appointed executor-dative to a British subject who died intestate.

⁴ [1941] P. 16.

sionary interests in an English trust fund upon the death of their mother before the war, the Public Trustee sought and received a grant of administration *ad colligenda bona*; and in the case of *In re van Tuyl van Serooskerken*,¹ a similar grant was made to the Public Trustee where the sole executor was resident in enemy-occupied territory.²

The Supreme Court of the State of Iowa gave in 1920 a clear decision³ to the effect that enemy nationals resident in enemy territory could take (or, more precisely, the Alien Property Custodian on their behalf) under a will made by an American citizen resident in Iowa who died in August 1917, during the war between the United States and Germany, and whose will was proved during the war. The beneficiaries were German nationals resident in Germany, and the devise and bequest to them of real and personal estate was challenged by relatives resident in the United States. The Alien Property Custodian was a party to the proceedings and contended for the validity of the devise and bequest. The Supreme Court in upholding the devise and bequest said:

'We do not find that it has ever been expressly held that the law of nations,⁴ as judicially declared, renders void a devise made to an alien enemy. We do not find it so held in direct terms, and we think there is reason for distinguishing the act of devising property to an alien from those transactions heretofore held void, especially when the devise relates to real estate. Nothing passes to the enemy at the time of the making of the will. The making of the will involves no personal transaction between the devisee and testator. Nothing passes at that time, nor can anything pass until the death of the testator. On the probate of the will, an executor is appointed, who serves as custodian of all the property, under the direction of the court. No action can be maintained by the alien to recover the property, or the increment of the property, while a state of war exists, and he acquires no dominion over it either for use or service. A bequest by one relative to another, though the other be an alien enemy, does not even remotely suggest a purpose to give aid or comfort to the alien enemy, and does not, and in the nature of things cannot, tend to increase his resources....'

¹ [1941] P. 16.

² For the practice followed upon the administration of the estate of a person dying in England and owing debts to persons in enemy-occupied (and presumably enemy) territory, see *In re Gess* [1942] Ch. 37.

³ *In re Kielsmark's Will*, 188 Iowa 1378, 177 N.W. 690, 11 A.L.R. 156; Hudson, *Cases on International Law* (2nd ed.), p. 1292; *Ex parte Boussmaker* (1806) 13 Vesey 71 is cited in the judgment. See also *In re Bendit's Estate* (1925) 209 New York Supp. 682; *Annual Digest*, 1925-1926, Case No. 341.

⁴ It is difficult to see how the 'law of nations' could produce this municipal effect.

It should be noted that the testatrix had herself precluded the possibility of giving aid and comfort to the enemy by directing her executor to hold the property devised and bequeathed until the beneficiaries arrived in the United States or for a period of five years after the end of the war.

(iii) *Disposition of property inter vivos.* At common law the governing factor would seem to be whether the disposition by an enemy of property situated in this country could be effected without intercourse with the enemy. It is not clear what is meant by intercourse with the enemy and what intercourse is illegal. Suppose an enemy to own shares in an English company or a motor car garaged in a London garage. A sale of the shares would involve communication across the line of war, and even if the enemy, without previous communication, merely sent a duly signed transfer of the shares without expecting the proceeds to be remitted to him during the war, the act of the transferee in signing the transfer and putting it forward to the company for registration involves intercourse with the enemy, namely, an attempt to contract with him. Suppose, however, that the enemy desiring to give me the shares and the car sends to me in England a signed transfer of the shares and an order to the garage-proprietor to deliver the car to me, it is again submitted that my acceptance of either gift, though I address no communication to the enemy, involves intercourse with the enemy and is illegal and void; gift is a species of agreement, a bilateral transaction; a donor cannot make me the owner of property without my assent and even if my assent is tacit and involves the making of no overt communication to him, it is submitted that my assent is an 'act in the law' and creates a legal relationship.¹

During the currency of legislation such as the Trading with the Enemy Act, 1939, these questions are not likely to arise, as the enemy's property in this country will almost certainly be taken out of his control and vested in the Custodian of Enemy Property.

Section 5 of the Trading with the Enemy Act, 1939, renders ineffective the transfer by an enemy (as defined by the Act as amended) of any 'securities' as therein defined.

There remains the question of the employment by the enemy of an

¹ An Irish case, *Grundy v. Broadbent* [1918] 1 I.R. 433, presents some difficulty. There the Irish Chancery Division upheld as valid an equitable assignment of a chose in action for valuable consideration made during the war by a firm in Austria to a firm in London, so that the latter was able to prove against the estate of a deceased debtor. The assignment involved the despatch from Austria to London of a letter which contained a notice of assignment addressed to the debtor. (See section 4 (1) of the Trading with the Enemy Act, 1939, as to assignments of choses in action.)

agent in this country. Can the enemy effectively transfer property in this country when he has, before becoming an enemy, irrevocably empowered an agent to do so on his behalf in circumstances which involve no intercourse with him? The decision of a full Court of Appeal in *Tingley v. Müller*,¹ to which reference has already been made,² suggests that we can, in spite of the vigorous dissent of Scrutton L.J., who regarded buying or selling the land of an enemy as intercourse with an enemy and illegal, give an affirmative answer to this question, either by reason of the peculiar nature of an irrevocable power of attorney under section 9 of the Conveyancing Act, 1882, now re-enacted in the Law of Property Act, 1925, section 127, or on the ground that no further communication by the agent with his principal is necessary. There appears to be no reason to confine this proposition to real property.

C. WILLS AND INTESTACY

An enemy dies during a war, leaving property in England. The fact that he was an enemy will not (apart from the claims of the Custodian of Enemy Property or an inquisition of office or the provisions of the Peace Treaty) affect the distribution of his property either in accordance with his will or upon an intestacy, except that the persons entitled if enemy will not be able to receive what is due to them during the war.

The practice governing grants of probate and letters of administration upon the death of enemy nationals leaving property in this country has been made clearer by the decision in *Re Fischer*³ and a Practice Note issued by the Senior Registrar of the Principal Probate Registry.⁴ In that case upon the death of an enemy national intestate in England during the war the family's adviser was informed by the Board of Trade that

¹ [1917] 2 Ch. 144 (C.A.).

² P. 60; see also below, p. 207.

³ [1940] 2 All E.R. 252. See *Re Loewenstein*, *The Times* newspaper, August 27, 1941 (deceased an allied national resident in enemy-occupied territory).

⁴ *Ibid.* p. 253. 'Consent by Custodian of Enemy Property to Grants of Representation. The consent in writing of the Custodian of Enemy Property, whose office is situate at that of the Public Trustee, Kingsway, London, W.C., must be obtained and produced before a grant of representation can issue (i) in respect of the estate of a deceased person of whatever nationality who was resident in enemy territory, such territory being defined by the Trading with the Enemy Act, 1939, s. 15(1)(b), (ii) in respect of the estate of a deceased German national, who was resident in neutral territory, (iii) to a German national residing in neutral territory in respect of the estate of any deceased. Such consent is necessary whether the deceased died before or after the outbreak of war. No grant of representation can issue to any person resident in enemy territory as defined by the aforesaid Act or to his attorney. Any case in which there is doubt should be referred to the Custodian of Enemy Property for his decision as to the necessity of his consent.'

'if the deceased at the date of his death was resident in this country, there was no objection to his estate being administered in the usual way, provided that a return was made to the Custodian of Enemy Property of any part of the estate demised [? devised] to, or held for the benefit of, the members of his family resident in enemy territory, and that no part of his estate or the proceeds thereof was transmitted to such members of his family without the necessary government authority.'

The Court granted letters of administration to a son of the deceased resident in England and to his solicitor upon an undertaking to comply with the foregoing directions.

D. DOMESTIC RELATIONS

The outbreak of war is not likely to have much effect upon an enemy's domestic relations, because they will usually take effect in the place where he is living, that is, in enemy territory. If the objects of those relations are in this country, for instance, a wife and children, it is difficult to see how he can exercise those relations. On the status of a guardian, Hyde¹ cites a passage in *Lamar v. Micou*² to the effect that

'A state of war does not put an end to pre-existing obligations or transfer the property of wards to their guardians, or release the latter from the duty to keep it safely, but suspends until the return of peace the right of any one residing in the enemy's country to sue in our courts.'

Marriage. A valid marriage can be contracted in good faith during war between a British subject and an enemy in the national or the territorial sense. 'Marriage is not only a contract, it is a transaction involving and establishing status, and in the absence of authority I am of opinion that there is nothing in our law to render the marriage of a domiciled Englishwoman with an alien enemy an invalid marriage'—per Lord Sterndale M.R. in *Fasbender v. Attorney-General*,³ where a British woman domiciled in England went from England to Germany lawfully between the dates of the signature and ratification of the Treaty of Peace and married a German national there.

Not only is such a marriage valid but the consequences upon nationality which normally flow from marriage take effect. In the case cited the woman effectively exchanged her nationality for German

¹ ii, § 609, p. 211, n. 4.

² 112 U.S. 452, 464.

³ [1922] 2 Ch. 850, 858. The woman had to contend that her marriage was invalid (in spite of the prohibition against bastardizing one's own issue—whether there was any or not does not appear). She also contended that by marrying an enemy she was guilty of treason! See also *Doe v. Jones* (1791) 4 T.R. 300 and comment thereon by Younger L.J. [1922] 2 Ch. at p. 869.

nationality. Where the man is British and the woman an enemy national, there does not appear to be any reason why she should not at once acquire British nationality. But in the *Fasbender* case stress was laid upon the complete good faith of the parties; it by no means follows that a female enemy national who went through a ceremony of marriage with a British subject in time of war in order to escape the inconvenience of being an enemy in this country, would contract a valid marriage. In fact, many marriages to which one party was British and the other enemy took place in England during the War of 1914 to 1918 and have taken place during the recent war.

A very limited amount of correspondence between Great Britain and enemy countries takes place under licence. Can a person in this country and a person in an enemy country exchange binding promises to marry? It is submitted that, so far as English law is concerned, the answer is in the negative.

An English Court can grant a decree of divorce against a respondent of enemy nationality.¹

¹ On the question of service of petitions for dissolution of marriage upon persons in enemy or enemy-occupied territory, see *Read v. Read* [1942] P. 87 and *Luccioni v. Luccioni* [1943] P. 49.

CHAPTER 6

FRUSTRATION OF CONTRACT¹

As we have already seen, the outbreak of war may discharge a pre-war contract by making its performance *ipso facto* illegal, even when neither party becomes an enemy in the territorial sense,² the sense in which we shall use the word 'enemy' in this chapter in the absence of contrary indication. And the mere fact that the outbreak of war makes one party to a contract an enemy does not necessarily mean that it is abrogated.³

In this chapter we are concerned with the circumstances in which the outbreak of war or the consequences of war or warlike acts will afford to a party a defence for not performing an obligation arising from contract, or, further, will discharge a contract entirely. The general rule is that war and warlike acts and their consequences do not excuse performance under a contract or discharge the contract. There are, however, many exceptions, of which the doctrine of frustration of contract is the most important in its effect and the most difficult to apply. We shall discuss it first and deal later⁴ with the kindred but less important consequences of the effect of war in interfering with the performance of contracts.

Frustration by reason of war is an elliptical expression. War does not itself frustrate a contract and is, of course, not in any way an essential ingredient in frustration. But war and its concomitants generally involve a violent interruption of commercial and other relations and thus provide the commonest illustrations of frustration. For the purposes of the effect of illegality and of a party to a contract being or becoming an enemy, 'war' has a technical meaning, and the question whether Great Britain is at war or not depends in case of doubt upon the statement of the appropriate department of the Executive.⁵ For the purposes of frustration unconnected with illegality the term 'war' is not used in a technical sense; it is the actual facts and consequences which matter.⁶

It is submitted that the sense in which the word 'frustration' is used,⁷ judicially and by text-writers, is not uniform and is changing, and it

¹ Based upon articles in 35 *L.Q.R.* (1919) pp. 84-100 and 56 *L.Q.R.* (1940) pp. 173-207.

² *Esposito v. Bowden* (1857) 7 *El. & Bl.* 763.

³ *Halsey v. Esposito* [1916] 1 *K.B.* 143; 2 *K.B.* 707 (C.A.).

⁴ *P.* 166.

⁵ See chapter 1. ⁶ See *Branson J. in Court Line v. Dant* (1939) 161 *L.T.* 35.

⁷ For a modern statement, see Viscount Simon L.C. in *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* [1945] *A.C.* 221, 228 (which will be referred to as 'the Cricklewood case').

may be useful to examine its meaning at the outset. Historically, it is used to denote the operation of the law in discharging a contract by reason of the occurrence of events or circumstances which were not within the contemplation of the parties when making it, and which are of such a character that to hold the parties to their contract would be to impose a new contract upon them; the legal device underlying this legal operation is, as will later be submitted, that of the implied term. The effect of supervening illegality is, historically, quite different; the ensuing discharge operates simply and directly, and there is, strictly speaking, no need to speculate upon the expectations of the parties or to invoke the doctrine of frustration; a plain rule of law suffices to discharge the contract, just as if (to employ Lord Alvanley's illustration¹) an Act of Parliament had been passed invalidating the contract thenceforward.

This distinction between supervening illegality and frustration in the strict, historical sense is recognized, for instance, by Viscount Simon L.C. in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*;² by Simonds J. in *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*,³ where he held the contract to be discharged upon the outbreak of war by reason of illegality and so found it unnecessary to deal with the plea of frustration; and by the Court of Appeal in⁴ the latter case, who, while reversing Simonds J. on grounds not here relevant, dealt with supervening illegality and frustration as two separate points. Nevertheless, there is a growing tendency (which we venture to deplore) to include impossibility arising from supervening illegality within the conception and terminology of frustration,⁵ and there can be little doubt that this kind of impossibility is covered by the following words occurring in subsection 1 of section 1 of the Law Reform (Frustrated Contracts) Act, 1943:⁶

'Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract....'

¹ In *Furtado v. Rogers* (1802) 3 Bos. & P. 191, 198.

² [1943] A.C. 32, 41: 'There is a further reason for saying that this subsidiary contention of the appellants must fail, namely...and, therefore, the contract could not be further performed because of supervening illegality', citing the *Ertel Bieber* case [1918] A.C. 260, which has usually been regarded as a straight case of supervening illegality.

³ [1944] Ch. 13; see also [1946] A.C. 219.

⁴ See note 3.

⁵ This is implicit throughout the speeches delivered in the House of Lords in the *Fibrosa* case. See also *The Steaya Romana* [1944] P. 43.

⁶ Printed in Appendix II, p. 411.

The full effect of this recent and wider conception of frustration has not yet been realized, and it may be that some of the language used in this chapter fails to reflect it.

We shall discuss the matter under the following headings:

A. The history up to the War of 1914 to 1918 (1) of the common law rule as to supervening difficulty and impossibility; (2) of the commercial doctrine of the frustration of the adventure; (3) of their coalescence.

B. The theory underlying frustration in its present sphere.

C. The present law.

A. HISTORY UP TO THE WAR OF 1914 TO 1918

(1) *The common law as to supervening difficulty and impossibility.* In 1647, in *Paradine v. Jane*¹ in the King's Bench, a tenant of land pleaded in an action brought by his landlord to recover rent reserved by the lease (the reservation of rent being regarded as equivalent to a covenant to pay it) that

'a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled....'

This plea was held insufficient on the ground that

'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, and therefore if the lessee covenants to repair a house, though it be burned by lightning or thrown down by enemies, yet he ought to repair it.'

Paradine v. Jane is not strictly a case of supervening impossibility, because to cite Pollock's quotation from Savigny: 'There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay.'² Nevertheless, the passage last cited above has been accepted for more than three centuries as authority for the absolute character of a promise which the promisor had not the foresight or the desire to qualify; the law says to him, 'You have only got yourself to blame'.

From time to time attempts were made to modify the rigidity of this rule by inviting the Court to imply a term excusing the performance

¹ Aleyn 26. See also *Harrison v. North* (1667) 1 Ca. in Ch. 83, an inconclusive case also arising out of the Civil War. For the modern law of impossibility in relation to leases, conveyances and mortgages, see Walford in 57 L.Q.R. (1941), pp. 339-372, and, below, chapter 14.

² *Principles of Contract* (10th ed.), p. 282.

of a promise, in terms absolute, in certain events. Instances are *Brecknock and Abergavenny Canal Navigation v. Pritchard*¹ in 1796 and *Atkinson v. Ritchie*² in 1809, in both of which the attempt to imply a mitigating term was rejected in reliance upon *Paradine v. Jane*. In *Atkinson v. Ritchie*, Lord Ellenborough C.J. said: 'No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance.' The rule received a somewhat severe shaking in *Hall v. Wright*³ (action for breach of promise of marriage against a man suffering from what appears to have been pulmonary tuberculosis), and in *Taylor v. Caldwell*,⁴ a master of the common law, Blackburn J., made the first serious breach in it by implying a condition excusing a performance which can only be effected if a given thing continues to exist. In that case, the Surrey Music Hall, Newington, of which the defendant had agreed to give the plaintiff the use for a series of concerts to be given by the latter, was destroyed by an accidental fire before the date of the first concert, and thus the defendant was unable to carry out his agreement. The agreement, which was in writing, contained no express reference to the destruction of the premises, though expressed to be made 'God's will permitting'. The plaintiff claimed damages for breach of the agreement. Blackburn J. after admitting that

'where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible',

drew from the English authorities the conclusion that

'this rule is only applicable when the contract is positive and absolute, and not subject to any condition express or implied: [and that] where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the default of the contractor'.

¹ 6 T.R. 750.

³ (1858) El. Bl. & El. 746.

² 10 East 530, 533.

⁴ (1863) 3 B. & S. 826, 833.

Note that Blackburn J. resorted to an implied condition for the purpose of doing what justice seemed to him to require.

Four years later *Taylor v. Caldwell* was followed in another case of a contract *de certo corpore*, where A contracted to erect machinery in buildings belonging to B, payment to be made on completion, and, the buildings being burnt down before the work was completed, the contract was held to be discharged, and A was unable to recover payment for the work already done.¹ Lord Parker pointed out² the difference between these two cases, namely that in *Taylor v. Caldwell* a condition precedent was implied, whereas in *Appleby v. Myers* the Court implied a condition subsequent.

Some years elapsed before any further extension of the *Taylor v. Caldwell* principle was made. *Howell v. Coupland*³ is a case of the actual perishing of the thing, a potato crop, which was not in existence at the time of the contract. In *Robinson v. Davison*⁴ (a case of a contract to play the piano), Mrs Davison did not perish before her concert, but became incapacitated by illness from performing. *Taylor v. Caldwell* was prayed in aid—unnecessarily, it is submitted, because contracts for personal services are governed by a rule which was laid down long before *Taylor v. Caldwell*, and was relied upon by Blackburn J. in that case. Still, *Robinson v. Davison* is interesting as shewing a readiness to extend the legal effect of the perishing of a person or thing to cover the case of a person or thing ceasing to exist in the state contemplated by the contract. Mrs Davison continued as a woman, but was no longer a piano-playing woman. *Nickoll v. Ashton*⁵ illustrates this extension in the case of a thing. The defendants had sold to the plaintiffs a cargo of Egyptian cotton-seed 'to be shipped by the steamship *Orlando* at Alexandria...during the month of January 1900'. The *Orlando* was stranded in December 1899, and, although she existed in January 1900, she did not exist as a cargo-carrying ship. The Court of Appeal held by a majority that the contract was subject to the condition that the parties should be excused if before breach the *Orlando* should cease to exist as a cargo-carrying ship without the defendants' default (or, more precisely, cease to be available as a cargo-carrying

¹ *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

² [1916] 2 A.C. at p. 423.

³ (1874) L.R. 9 Q.B. 462; 1 Q.B.D. 258.

⁴ (1871) L.R. 6 Ex. 269.

⁵ [1901] 2 K.B. 126 (C.A.). It is interesting to note that the judgments of A. L. Smith M.R. and Romer L.J. are based on *Taylor v. Caldwell* and shew no trace of connexion with or influence by the commercial doctrine of the frustration of the adventure, while the dissentient judgment of Vaughan Williams L.J. (at p. 137) contains a direct reference to that doctrine.

ship at the stipulated time and place), and so the plaintiffs failed in their action for damages for failure to ship the cargo under the contract.

So far then we find the discharging effect of supervening impossibility of performance confined to the perishing of a person who is a party to the contract, or of a thing which is the subject-matter of the contract or stands in essential relationship to it, or to a cessation of the essential condition of that person or thing. It remained for King Edward VII to afford the occasion for the next extension of the doctrine. Amongst the group of Coronation Seat cases¹ to which the illness of that monarch in June 1902 gave rise, *Krell v. Henry*² is perhaps the most important. The defendant had agreed to hire a flat in Pall Mall for two days, the 26th and 27th of June, and had paid a deposit. The letters exchanged between the parties contained no reference to the Coronation procession, but it was obvious from all the surrounding circumstances (including previous conversation with the plaintiff's house-keeper) that the flat was hired for the purpose of viewing the procession. When the King's illness made it impossible for the procession to take place on those days, the defendant declined to pay the balance of the rent, and made a counter-claim (abandoned in the Court of Appeal) for the deposit already paid. That Court held that the Coronation procession was the foundation of the contract, just as the continued existence of the Surrey Music Hall was the foundation of the contract in *Taylor v. Caldwell*, and that its non-happening without the defendant's default excused him from the performance of the contract. But this doctrine must not be thought to cover the case where the event which failed to happen, e.g. the Royal Naval Review at Spithead on June 28, 1902, was not the foundation of the contract. The Review was merely the motive which induced the defendant to charter the plaintiff's vessel 'for the purpose of viewing the naval review' (which was cancelled) 'and for a day's cruise round the fleet' (which remained anchored at Spithead).³

In *Krell v. Henry*⁴ Vaughan Williams L.J. said of *Nickoll v. Ashton*:

'Whatever may have been the limits of the Roman law, [this case] makes it plain that the English law applies the principle not only to

¹ See McElroy and Williams, 'The Coronation Cases', in *Modern Law Review*, iv (1941), pp. 241-260 and v (1941), pp. 1-20.

² [1903] 2 K.B. 740 (C.A.). This decision takes us a long way from *Taylor v. Caldwell*, for the destruction of the music hall made it impossible to carry out that contract, whereas the payment of money is never objectively impossible. The decision was regarded by the Court of Appeal as an extension of *Taylor v. Caldwell*, but they also derived support from the doctrine of frustration.

³ *Herne Bay Steamboat Co. v. Hutton* [1903] 2 K.B. 683 (C.A.).

⁴ [1903] 2 K.B. 740, 748.

cases where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance.¹

(2) *The commercial doctrine of the frustration of the adventure.* We must now turn to the other source of the present rules as to frustration of contract, namely, cases of maritime ventures, and we shall find later that the two distinct streams of authority have merged. It is submitted that the source of the commercial doctrine of frustration is the test which prudent business men faced with a casualty would apply; if it is physically impossible to proceed with the venture, because, for instance, the ship is at the bottom of the sea, *cadit quaestio*; if, on the other hand, it is physically possible but commercially impracticable, then prudent business men would regard the venture as at an end. This is the conception which underlies constructive total loss; as Maule J. said in *Moss v. Smith*:²

'it may be that it may be physically possible to repair the ship, but at an enormous cost: and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost.'

In 1831, in *Freeman v. Taylor*,³ we find an instance of the frustration of a charterparty by reason of delay and deviation on the part of the shipowner. Tindal C.J. left it to the jury to say 'whether the delay

¹ The effect of discharge by frustration upon the rights and duties of the parties was discussed in some of the Coronation cases, but, having regard to the recent decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 (hereinafter referred to as the *Fibrosa* case), we can defer that question until later.

² (1850) 9 C.B. 94, 103. The point of contact between the doctrine of frustration and insurance is also shewn by cases such as *Carras v. London & Scottish Assurance Corporation* [1936] 1 K.B. 291 and *Kulukundis v. Norwich Union Fire Insurance Society* [1937] 1 K.B. 1. See also *Marstrand Shipping Co. v. Beer* (1936) 56 Ll.L.R. Rep. at p. 173.

³ 10 L.J.C.P. 26, 28. No doubt earlier express references to frustration can be found; I am merely concerned to shew that the doctrine was well established before *Taylor v. Caldwell* and has a different origin. From the cases cited in *Freeman v. Taylor* it is clear that it owes much to decisions upon the questions whether a particular term in a contract is or is not a condition precedent, whether a non-performance goes to the whole root and consideration of the contract, etc. See *McElroy, Impossibility of Performance*, pp. 121 *et seq.*, where the following references to the use of the term 'frustration' are given: *Spence v. Chodwick* (1847) 10 Q.B. 517, 530 (charterparty), including a reference to *Paradine v. Jane* (*supra*), and *Atkinson v. Ritchie* (*supra*); *Tarrabochia v. Hickie* (1856) 1 H. & N. 183, 185 (charterparty); *MacAndrew v. Chapple* (1866) L.R. 1 C.P. 643, 648 (charterparty).

was so great as entirely to frustrate the freighter's whole object in chartering the ship', and the Court of Common Pleas upheld the direction. In the next case we find the doctrine connected with the effects of war. In *Geipel v. Smith*,¹ where a shipowner had before the outbreak of war contracted to carry a cargo of coal from Newcastle to Hamburg, the Court held that he was justified in refusing to load under a charterparty containing an exception of 'restraints of princes and rulers' when the French blockade of the port of Hamburg prevented its performance. This exception not merely protected the shipowner from an action for damages, but operated to release him from the charter.

'The object of each of them [said Blackburn J.]² was the carrying out of a commercial speculation within a reasonable time; and if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say, 'Our contract cannot be carried out'; and therefore the shipowner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end.'

Again, Lush J. said:³ 'a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this'. *Taylor v. Caldwell* is not mentioned, though *Paradine v. Jane* is.

Two years later, in *Jackson v. Union Marine Insurance Co.*,⁴ the Exchequer Chamber had to decide in an action upon a policy of insurance whether there had been a loss of chartered freight by perils of the seas. The shipowner undertook by charterparty dated in November 1871 to proceed from Liverpool to Newport (Mon.) with all possible despatch (dangers and accidents of navigation excepted), and there load a cargo of iron rails and carry them to San Francisco. On the voyage round from Liverpool the vessel went aground on January 4, 1872, and was got off on February 18 in such a condition that her repairs would not be completed until the end of August. Meanwhile, on February 15, the charterer threw up the charter and chartered another ship. The effect of the delay would have been to substitute an autumn for a spring voyage, which meant a different adventure. The Court held that the shipowner could not have maintained an action against the charterer for not loading, and therefore had sustained a loss of chartered freight by perils of the seas. The finding of the jury upon which the majority judgment of Baron Bramwell is based was that the time necessary to get the ship off the rocks and repair

¹ (1872) L.R. 7 Q.B. 404.

² At p. 413.

³ At p. 414.

⁴ (1873) L.R. 8 C.P. 572; (1874) 10 C.P. 125.

'her so as to be a cargo-carrying ship was so long... as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers', and so far from being deterred by the severer principles laid down in *Taylor v. Caldwell*, the Baron says that it 'is a strong authority in the same direction'. Mr Justice Blackburn, who delivered the judgment of the Court of Queen's Bench in *Taylor v. Caldwell*, concurred in Baron Bramwell's judgment in *Jackson v. Union Marine Insurance Co.* The fact that these cases of maritime ventures involve the construction of special clauses in charterparties and similar documents is apt at first sight to obscure their bearing upon the general principles of the discharge of contracts, but a few words from Baron Bramwell's judgment in *Jackson's* case put these special clauses in their proper light. At p. 143 he said:

'The shipowner, in the case put, expressly agrees to use all possible dispatch: that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage: that is a condition precedent as well as an agreement; and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations, owing to excepted perils [as actually happened in this case] are not performed, there is no cause of action, but there is the same release of the charterer.'

Here lies the point in *Jackson's* case for us. The excepted perils ('dangers and accidents of navigation') protect the shipowner from an action, but if the contract is such that the Court will imply a term that the vessel will arrive to load at a certain time, then they will not protect him from the right of the charterer to a discharge of the contract if that term is not fulfilled. It is the implied term that is of interest for our present purpose. Again, on p. 144, speaking of the excepted perils, he said:

'They excuse the shipowner but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries *A* and *B*, and it was not....'

In *Dahl v. Nelson, Donkin & Co.*¹ the House of Lords held that a shipowner who had undertaken to take his vessel and her cargo to the X Docks, 'or so near thereunto as she may safely get', and found when she arrived outside the docks that she must wait at least five weeks, was entitled to call upon the charterer to take delivery outside the X Docks at

¹ (1881) 6 App. Cas. 38. See also *Assicurazioni Generali v. s.s. Bessie Morris Co.* [1892] 2 Q.B. 652.

the charterer's expense. Five weeks would have been an unreasonable period to wait, and in the words of Lord Blackburn,¹ after referring to *Moss v. Smith*, *Geipel v. Smith* and *Jackson v. Union Marine Insurance Co.*: 'a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end'. He did not consider it necessary to refer to *Taylor v. Caldwell*, and indeed any reference would have been out of place.

In all these cases of maritime ventures the judgments, in so far as they rest upon precedent and not merely upon a business-like construction of a written contract, rely upon an entirely different line of authority from that under consideration in *Taylor v. Caldwell*. The arguments have a definitely maritime flavour, and any references to the ordinary principles of the common law affecting discharge of contract are subsidiary.

(3) *Their coalescence.* We now come to the coalescence of these two streams of authority.² Although we find them making earlier contact (as in *Jackson v. Union Marine Insurance Co.* and *Krell v. Henry*), it was not until the War of 1914 to 1918 that the real fusion took place.³ Lord Loreburn in the passage about to be quoted asserted that the principles applicable in cases of maritime ventures are the same as in others, but it is believed that, historically speaking, it would be more correct to say that if the principles are the same now, it is mainly due to the maritime venture cases that this is so.

'When this question [the discharge of a contract by the operation of an implied condition, says Lord Loreburn]³ arises in regard to com-

¹ At p. 53.

² A good instance of the coalescence will be found in a remark by Lord Wright in a maritime case, *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation* [1942] A.C. 154, 182: 'I must briefly explain my conception of what is meant in this context by impossibility of performance, which is the phrase used by Blackburn J. [in *Taylor v. Caldwell*]. In more recent days the phrase more commonly used is "frustration of the contract" or more shortly "frustration". But "frustration of the contract" is an elliptical expression. The fuller and more accurate phrase is "frustration of the adventure or of the commercial or practical purpose of the contract". This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depend on the existence, at the relevant time, of a specified object, as in the instances given by Blackburn J., to cases where the essential object does indeed exist, but its condition has by some casualty been so changed as to be not available for the purposes of the contract either at the contract date, or, if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost.'

³ *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.* [1916] 2 A.C. at p. 404.

mercial contracts, as happened in *Dahl v. Nelson, Donkin & Co.*, *Geipel v. Smith* and *Jackson v. Union Marine Insurance Co.*, the principle is the same and the language used as to "frustration of the adventure" merely adapts it to the class of case in hand. In all these three cases it was held, to use the language of Lord Blackburn, "that a delay in carrying out a charterparty, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end".

B. THE THEORY UNDERLYING FRUSTRATION

Without attempting an exhaustive examination of the theory underlying frustration, we shall enumerate what seem to us to be the principal theories prevalent in England,¹ and say something about each of them. They are as follows:

(a) the theory of an implied term which the law imputes to the parties, in order to regulate a situation which in the eye of the law the parties themselves would have regulated by agreement if the necessity had occurred to them; this we venture to call the classic theory;

(b) the theory of the disappearance of the basis or foundation of the contract: *non haec in foedera veni*;²

(c) Lord Wright's theory to the effect that, the parties not having dealt with the matter, the Courts must determine what is just, must find a reasonable solution for them, a theory which, we suggest, involves the importation of another implied term;

(d) the theory of common mistake;

(e) the theory of supervening impossibility.

The judicial output on the theory of frustration is copious and far from uniform.

(a) *The theory of the implied term.* We shall cite five statements of this theory. The first is by Lord Loreburn in *Tamplin (F. A.) Steamship Co. v. Anglo-Mexican Petroleum Products Co.*:³

'In the recent case of *Horlock v. Beal*⁴ this House considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those

¹ See Webber, *Effect of War on Contracts* (2nd ed.) 1946, Part III. For foreign (including Scottish) solutions of similar problems, see *Journal of Comparative Legislation*, 1946 and 1947 (including Zepos on 'The New Greek Civil Code').

² Per Lord Finlay L.C. in *Bank Line v. Arthur Capel & Co.* [1919] A.C. at p. 442.

³ [1916] 2 A.C. at p. 403; adopted by Lords Dunedin and Atkinson in the *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. at p. 127 and p. 131.

⁴ [1916] 1 A.C. 486.

decisions confirms me in the view that, when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation in which the parties contracted.... Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said "if that happens, of course, it is all over between us"?

Secondly, in the *Bank Line* case Lord Sumner said: ¹

'The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties.'

The third is to be found in the opinion of the Privy Council delivered by Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co.*: ²

'Frustration... is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned, and of the main objects of the contract... It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.'

And on p. 507 he said:

'An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their [common] object.'

Fourthly, Russell J. in the case of *In re Badische Co.*: ³

'The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed

¹ [1919] A.C. at p. 455.

² [1926] A.C. 497, 510.

³ [1921] 2 Ch. 331, 379.

common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract.

To catalogue all the judicial opinions expressed in the cases of the War of 1914 to 1918 would be to overburden a chapter which is bound in any case to be long. To mention only a few, Swinfen Eady and Bankes L.JJ. in *Scottish Navigation Co. v. W. A. Souter & Co.*¹ both accepted the theory of the implied term. So did Pickford L.J. in *Countess of Warwick Steamship Co. v. Le Nickel Société Anonyme*,² and it is interesting to note that he cited as one of his authorities the passage from Lord Haldane's speech in the *Tamplin* case, which we shall presently quote as a statement of the basis of the contract theory.

In the *Hirji Mulji* case³ Lord Sumner in 1926 was able to look back at the leading frustration decisions of the War of 1914 to 1918, and he adopted the theory of the implied term without hesitation and without discussing any alternative. Yet in those cases evidence can be found both for the implied term theory and for the basis of the contract theory next to be mentioned. In the *Tamplin* case the theory of the implied term commended itself to Lord Loreburn⁴ and to Lord Parker,⁵ while the basis of the contract theory was espoused by Lord Haldane.⁶ In the *Metropolitan Water Board* case, the implied term theory was adopted by Lord Dunedin,⁷ Lord Atkinson⁸ and Lord Parmoor,⁹ while Lord Finlay L.C.¹⁰ might be claimed as an adherent of the other theory. In the *Bank Line* case Lord Sumner¹¹ adopted an earlier statement of the implied term theory by Lord Watson, and Lord Wrenbury¹² took the same view; whereas Lord Finlay L.C.¹³ preferred the basis of the contract theory. In *Kursell v. Timber Operators and Contractors*¹⁴ (not a war case) Scrutton L.J. based the doctrine upon an implied term.

¹ [1917] 1 K.B. 222.

² [1918] 1 K.B. 372, 376.

³ Above, p. 144.

⁴ [1916] 2 A.C. at p. 404.

⁵ At p. 422.

⁶ At pp. 407 and 411. Lord Atkinson at p. 422 referred to the 'foundation of the contract', but I think that his speech in the *Metropolitan Water Board* case [1918] A.C. at p. 135, places him among the angels.

⁷ [1918] A.C. at p. 127.

⁸ At p. 135.

⁹ At p. 137.

¹⁰ At p. 127.

¹¹ [1919] A.C. at p. 459.

¹² At p. 461.

¹³ At pp. 442 and 444.

¹⁴ [1927] 1 K.B. 298. See also *Russkoe, etc. v. John Stirk & Sons* (1922) 10 Ll. L. Rep. 214.

Fifthly, and recently, in 1941 members of the House of Lords gave their adhesion to the implied term theory in *Joseph Constantine Steamship Line v. Imperial Smelting Corporation*¹ (not a war case). Viscount Simon L.C. regarded it as 'the most satisfactory basis'.² He pointed out that it had history on its side, having been adopted by Blackburn J. 'in *Taylor v. Caldwell*,³ which is practically the first case of the modern line of authorities'. Moreover, 'it has the advantage of bringing out the distinction that there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur'. He added:⁴ 'Every case in this branch of the law can be stated as turning on the question whether from the express terms of the particular contract a further term should be implied which, when its conditions are fulfilled, puts an end to the contract.'

Viscount Maugham⁵ based the doctrine 'on the presumed common intention of the parties', either by the implication of a term or in some other way, 'e.g. by a legal presumption', and, it seems, on the whole inclined to the implied term. Lord Russell of Killowen, who was already deeply committed to the implied term, by inference affirmed his opinion⁶ in relying upon the statement by Blackburn J. already quoted from *Taylor v. Caldwell*. Lord Wright,⁷ without again examining the question, was of the opinion that 'the explanation which has generally been accepted in English law is that impossibility or frustration depends on the court implying a term or exception and treating that as part of the contract'. Lord Porter expressed no decided opinion but, it seems, inclines to the view that the matter is one of the construction of the contract. Is it absolute in its nature, or is it one 'where the promisor is only obliged to perform if he can?'⁸

(b) *The theory of the disappearance of the basis or foundation of the contract.* In the *Tamplin* case this theory was stated by Lord Haldane as follows:⁹

'When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing [in that case a ship on charter], and that availability comes to an end by reason of circumstances beyond the control of the parties, the

¹ [1942] A.C. 154.

² At p. 163.

³ *Supra*.

⁴ At p. 164.

⁵ At p. 169.

⁶ At p. 177.

⁷ At p. 186.

⁸ At pp. 203, 204. See Blackburn J.'s expression in *Taylor v. Caldwell* quoted above at p. 136: 'where there is a positive contract to do a thing, not in itself unlawful', etc.

⁹ [1916] 2 A.C. at p. 406.

contract is *prima facie* regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made.'

He then discussed the case of a suspensory stipulation providing for a partial or temporary suspension of certain obligations of the contract in certain events, and continued:

'Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.'

We suggest that the word 'deemed' is significant; it usually indicates in the mouth of a lawyer that the speaker is resorting to a legal fiction or is implying something which is not express.

Lord Finlay L.C. in the *Bank Line* case uses an expression sometimes employed in stating the basis of the contract theory,¹ 'the doctrine that a contract may be put an end to by a vital change of circumstances...'. And after describing the events which interrupted the performance of the charterparty he said:²

'In such a case the adventure contemplated by the charter is entirely frustrated, and the owner, when required to enter into a charter so different from that for which he had contracted, is entitled to say "non haec in foedera veni". In other words the owner is entitled to say that the contract is at an end on the doctrine of the frustration of the adventure as explained in [the *Tamplin* case].'

In effect this means that as the result of some event the performance which the parties are, or one party is, called upon to give is so different from what was contracted for that it could not have been in the contemplation of the parties. As he said in *Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Médulla*:³

'If, in consequence of war, there is a compulsory cessation of the execution of a contract for construction of works of such a character and duration that it fundamentally changes the conditions of the contract and could not have been in the contemplation of the parties when it was made, to hold that the contract still subsists would be "not to maintain the original contract but to substitute a different contract for it". (*Metropolitan Water Board's case*;⁴ *Distington Hematite Iron Co. v. Possehl & Co.*)⁵

¹ [1919] A.C. at p. 441.

³ (1923) 29 Com. Cas. 1, at p. 7.

² At p. 442.

⁴ *Supra*.

⁵ [1916] 1 K.B. 811.

Here, it seems to us, the two theories under discussion come very close together, for Lord Finlay, an advocate of the disappearance of the foundation of the contract theory, couples with it the test that the change of circumstances 'could not have been in the contemplation of the parties'. The basis of the contract theory was found attractive by Goddard J., in *W. J. Tatem, Ltd. v. Gamboa*,¹ arising out of the Spanish civil war, in order to meet the case in which the parties have foreseen the possibility of the occurrence of the frustrating event and yet have not provided what effect it should have. In that case the learned judge felt unable to hold that the parties had failed to contemplate the risk that a British ship, chartered for the purpose of evacuating civilian refugees from North Spanish ports, might be seized and detained beyond the period of the charter by the insurgent Government. Accordingly, when the shipowners sued the charterer for charter hire in respect of the days exceeding the period of the charter and were met with the plea of frustration, he upheld that plea but rested it upon the ground that the seizure and detention had destroyed the foundation of the charter.

'If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract [i.e. to pay the daily hire until re-delivery] is to be regarded as frustrated.'²

This short citation does not do justice to the learned judge's judgment, but, with great respect, may it not be asked whether this explanation of the doctrine of frustration does not also rest upon an implied term? Whether the parties are unlikely to have foreseen the frustrating event, as in the case of King Edward VII's illness on the eve of his Coronation, and so did not provide for it, or did foresee it, as in the case of the requisition of the ship in the *Bank Line* case, and yet failed to provide for all its consequences, is it unreasonable for the law to

¹ [1939] 1 K.B. 132. But in *Court Line v. Dant* (1939) 161 L.T. 35 Branson J. said that he thought that Goddard J. must have considered himself to be bound by what Bankes L.J. said in *Comptoir Commercial Anversois v. Power, Son & Co.* [1920] 1 K.B. at p. 886, if it had been brought to his attention. In justice to Goddard J. it should be pointed out that in the *Court Line* case the parties could not reasonably have foreseen the frustrating event, whereas in Goddard J.'s case both parties, if they did not envisage the precise cause of the frustration, knew very well that the ship was going into the lion's mouth. See Scrutton, *Charter-parties and Bills of Lading* (14th ed. by W. L. McNair and Mocatta), p. 112, n. (kk).

² At p. 139.

impute to them, and to imply in the contract, a term to the effect that upon the occurrence, and as a result, of these events and their consequences they would have regarded the contract as being at an end? If the continuance of a state of affairs or the non-happening of a certain event clearly underlies the whole contract—whether the parties say so or not—and if that state of affairs comes to an end or that event happens, then we suggest that it is reasonable for the Courts to imply a condition that the contract comes to an end. That is what Blackburn J. did in *Taylor v. Caldwell*, where it is very unlikely that the parties contemplated the destruction of the Surrey Music Hall. When Lord Haldane, in the passage which Goddard J. cites from his speech in the *Tamplin* case, says that ‘the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation’, we suggest that this also happens as the result of an implied condition—a condition that the foundation shall continue. We cannot see that it matters whether or not the frustrating event was foreseen by the parties, provided (a) (positively) that the event and its consequences are such that performance under the contract would be performance of a different contract, and (b) (negatively) that the parties have not expressly or by implication agreed that in spite of the event and its consequences performance should take place; if (a) is present and (b) is not, we suggest that the contract is dissolved by an implied term.

We submit that the antithesis between these two theories is an unreal one, and that they can be reconciled. The second, the theory of the disappearance of the foundation of the contract, is a statement that in the opinion of the Court what has happened would make performance in the altered circumstances so different from what was agreed upon as to be performance of a new contract. The first, the implied term theory, is a statement of the legal theory or device by means of which justice is done—a device, as Lord Sumner said,¹ ‘by which the rules as to absolute contracts are reconciled with a special exception which justice demands’. Perhaps the dissentient Baron Cleasby in *Jackson v. Union Marine Insurance Co.*² put his finger upon the true explanation when he said:

‘No doubt, when the existence of a particular person or thing, or state of things, can be regarded as the very foundation of a particular transaction, it may be implied that, if the foundation fails, the transaction which is founded upon it ceases to be effectual. But, upon this

¹ Above, p. 144.

² (1874) L.R. 10 C.P. at p. 141.

subject I would beg to refer to the clear and comprehensive judgment of my Brother Blackburn in *Taylor v. Caldwell*.¹

Is not the disappearance of the basis of the contract really an inference of fact which is drawn by the Court and upon which the Court bases the implication of a term to the effect that the parties are thereupon discharged?

(c) Lord Wright, in his address entitled 'Some Developments of Commercial Law in the Present Century',² prefers to regard the doctrine of frustration as an instance of the practice and duty of the judge to make sense of a contract to which the parties have given incomplete expression, to do for the parties what, if they had been more enlightened, they would have done for themselves, to interpret the contract *ut res magis valeat quam pereat*. This is presumably our old and much respected friend *The Moorcock*.³ It is certainly true that Lord Mansfield has impressed our commercial law with a strong sense of the duty to make it work for commercial men and to supply them with a serviceable instrument for the conduct of their business—to do for them often what they ought to have done for themselves, instead of telling them that they must suffer for their own neglect or stupidity. But has not this mainly been done, as it was in *The Moorcock*, by legitimate resort to the doctrine or fiction of the implied term?

Lord Wright's view of the doctrine of frustration will be found at p. 258 of the address quoted above,⁴ and reference should also be made to what he said in the *Fibrosa* case⁵ of the theory of the implied term: 'I do not see any objection to this mode of expression so long as it is understood that what is implied is what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable, not what as individuals they would or might have agreed.' But in *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] 265, 275 he repeated his repugnance to the implied term: 'To my mind the theory of the implied condition is not really consistent with the true theory of frustration.'

(d) *The theory of common mistake*. This was referred to by Viscount Haldane in the *Bank Line* case⁶ as one available theory and the one

¹ (1863) 3 B. & S. 826.

² *Legal Essays and Addresses*, pp. 252–286.

³ (1888) 13 P.D. 157.

⁴ He cited four decisions, which I have examined in 56 L.Q.R. (1940), pp. 180, 181: *Acebal v. Levy* (1834) 10 Bing. 367; cf. Sale of Goods Act, 1893, s. 8 (2); *Ford v. Cotesworth* (1868) L.R. 4 Q.B. 127; (1870) L.R. 5 Q.B. 544; *Hillas & Co. v. Arcos Ltd.* (1932) 38 Com. Cas. 23; *Hick v. Raymond* [1893] A.C. 22.

⁵ [1943] A.C. at p. 170.

⁶ [1919] A.C. 435, 445.

which was 'the real ground of the judgments in *Baily v. De Crespigny*';¹ but, as Lord Wright pointed out in the *Joseph Constantine* case,² while that may do for 'cases where the parties intend to contract on the basis of something which, though they do not know it, has [already] perished by causes beyond their control', it is difficult to regard it as an adequate explanation of the effect of 'supervening impossibility or frustration'.

(e) *The theory of supervening impossibility.* It cannot be denied, as has already been shewn, that the rule established by Blackburn J. in *Taylor v. Caldwell* upon the effect of supervening (physical) impossibility is one of the two historical sources of the doctrine of frustration. But it is submitted that the impetus derived from this source has led to the creation of a *nova species*. Blackburn J. was speaking of physical impossibility; the Surrey Music Hall had been destroyed by fire, and the defendant, as its proprietor or lessee, was unable to give the plaintiff the use of it for a series of concerts. But the doctrine of frustration embraces many cases where there is no physical impossibility; in the *Coronation Seat* cases it was still possible for the letter to enable the hirer to spend a pleasant afternoon sitting at the window, and the payment of money can never be impossible, for 'there is plenty of money in the world', to quote again Pollock's citation from Savigny.³ As Viscount Simon L.C. said in the *Joseph Constantine* case:⁴ 'the explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may in some circumstances not discharge the contract at all. On the other hand, impossibility is too stiff a test in other cases—for example', *Krell v. Henry*.⁵

Conclusion. There can now be no doubt that the balance of judicial⁶ authority is in favour of the implied term as the basis of the doctrine of frustration, and history appears to be on that side. If you regard the doctrine as a development of the rule as to supervening impossibility, then you find Blackburn J., who may fairly be called the pioneer in this field, resting his judgment in *Taylor v. Caldwell* upon the view that⁷ 'in contracts in which the performance depends on the continued

¹ (1869) L.R. 4 Q.B. 180.

² At p. 186. Williston, *Law of Contracts* (Revised edition, 1938), § 1937, considers that the foundation of the defence of impossibility based upon an 'implied or constructive condition' is fundamentally the same as the basis of the defence of mistake. 'As the basis of the defense of mistake is the presumed assumption by the parties of some vital supposed fact, so the basis of the defense of impossibility is the presumed mutual assumption when the contract is made that some fact essential to performance then exists, or that it will exist when the time for performance comes.' He prefers 'constructive' to 'implied'.

³ *Supra*, p. 135.

⁴ [1942] A.C. 154, 164.

⁵ [1903] 2 K.B. 740.

⁶ And see Exchange Control Act, s. 33 (below, p. 169).

⁷ [1863] 3 B. & S. 826, 829.

existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance'. If, on the other hand, you prefer to trace a different and more distinctively mercantile pedigree for the doctrine—*Geipel v. Smith*,¹ *Jackson v. Union Marine Insurance Co.*,² and *Dahl v. Nelson, Donkin & Co.*³—we suggest that you will be led to the same conclusion.

In *Jackson v. Union Marine Insurance Co.*, where again we find the familiar mercantile refrain ('put an end in a commercial sense to the commercial speculation'), the Exchequer Chamber implied a term (that the ship shall arrive 'in time for that adventure' or 'in a reasonable time') and held (per Bramwell B., at p. 148) that 'not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer'; again, at p. 144: 'When I say *he* is [released], I think *both* are. The condition precedent has not been performed, but by default of neither.' Both the majority and the minority judgments cite with approval *Taylor v. Caldwell*, and Cleasby B. accepted the doctrine of the implied frustration term in the passage already cited,⁴ though the doctrine did not lead him to the conclusion of the majority. Again, in *Dahl v. Nelson, Donkin & Co.*,⁵ Lord Watson expressly affirmed the doctrine as a characteristic of a mercantile contract, and based it upon an implied term.

C. THE PRESENT LAW⁶

In attempting to state the present position of the doctrine of frustration, it will be convenient to illustrate its operation and effect in the case of particular kinds of contract in the chapters which follow, but there are some general observations which may be made at this stage.

¹ (1872) L.R. 7 Q.B. 404. Here the term implied was not specifically described by the usual formula of frustration, but as a term the non-performance of which produced that result.

² (1874) L.R. 10 C.P. 125.

³ (1881) 6 App. Cas. 38.

⁴ Above, p. 149.

⁵ (1881) 6 App. Cas. 38, 59. Pollock (*The Pollock-Holmes Letters*, ii, p. 38), writing to Holmes in 1920, said of the Frustration cases: 'After all, is not the implied condition in those cases something of a fiction to screen rules of policy imposed on the parties and becoming, like equity of redemption, a real part of the contract only after that pressure has been applied?' I think that perhaps Williston (see above, p. 151) has something like this in mind when he uses the words 'constructive term'.

⁶ A summary of the law as it stood in January 1918 will be found in the Report of the Pre-War Contracts Committee (the Buckmaster Committee) (Cd. 8975 of 1918) and is reproduced in paragraph 4 of the Report of the Committee on Liability for War Damage to the Subject-matter of Contracts (Cmd. 6100 of 1939).

We shall deal with: (1) the circumstances in which the doctrine applies; (2) the character of its operation; (3) the consequences of its operation; (4) suspension clauses; and (5) the behaviour of a party about to allege frustration.

(1) *The circumstances in which the doctrine applies.* (a) There must have supervened since the formation of the contract certain events or circumstances of such a character that the Court will form the view that reasonable men in the position of the parties would not have made that contract, or would not have made it without inserting another term, if they had known what was going to happen;¹ that is to say, events or circumstances of such a character that to hold the parties to their contract would be to impose upon them a new and different contract.²

(b) The supervening events or circumstances may take the form of (*inter alia*)

(i) The cessation of a particular state of affairs.³

(ii) The non-happening of an expected event, e.g. the Coronation of Edward VII.⁴

(iii) The occurrence of an unexpected event, e.g. the outbreak of the Franco-Prussian War and the French blockade of Hamburg.⁵

(iv) The requisition by the Government of something which is the subject-matter of the contract or otherwise essential to its performance, for instance, a ship under charter,⁶ something contracted to be sold,⁷ etc.

(v) A prohibition against beginning or continuing performance as a result of legislation or the lawful action of the Executive in the exercise of its common law powers. For instance, in *Metropolitan Water Board v. Dick, Kerr & Co.*⁸ the Minister of Munitions in the exercise of statutory

¹ Compare an old opinion expressed in *Doctor and Student*, Dialogue II, chap. xxiv: 'And, after some doctors, a man may be excused of such a promise in conscience by casualty that cometh after the promise, if it be so, that if he had known of the casualty at the making of the promise he would not have made it.'

² For an unsuccessful attempt to dissect a contract and save part of it from frustration, see *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C. 265.

³ *Nicholl v. Ashton*, *supra*.

⁴ *Krell v. Henry* [1903] 2 K.B. 740.

⁵ *Geipel v. Smith* (*supra*); *White & Carter v. Carbis Bay Garage* [1941] 2 All E.R. 633 (display of advertisement rendered impossible by a Defence Regulation); the express provision in the contract was probably adequate to ensure a *pro rata* recovery of the sum due for displaying the advertisement, but the Court of Appeal went further and held that the contract was frustrated.

⁶ See below, chapter 8.

⁷ See below, chapter 15.

⁸ [1918] A.C. 119. See also *White & Carter v. Carbis Bay Garage* (*supra*); *Egham & Staines Electricity Co. v. Egham U.D.C.* [1944] 1 All E.R. 107 (H.L.);

powers directed a contractor in 1916 'to cease work upon your contract for the Metropolitan Water Board' and to comply with instructions as to the dispersal of labour and plant; the contract was dated July 24, 1914 (modified by a supplemental contract of May 10, 1915) and contemplated the completion of a reservoir within six years. The House of Lords held that the contract was dissolved by frustration; to have kept the contract alive and to compel the parties to resume performance when the prohibition expired would be 'not to maintain the original contract but to substitute a different contract for it'.¹

(vi) Many governmental acts during a war done in pursuance of statutory or of common law powers may produce frustration, e.g. the demolition of houses as impeding the operations of a battery of guns, the billeting of soldiers whereby a householder is unable to fulfil a contract with a lodger, the calling up of a man or woman under a contract of employment.²

Many cases of governmental action are, in effect, equivalent to a change of the law of our own country which, when producing impossibility, amounts to a defence as in *Baily v. De Crespigny*,³ where a railway company acting under compulsory statutory powers purchased the defendant's land and built a railway station upon it contrary to the provisions of a restrictive covenant as to building which the defendant had given to the plaintiff. This was held to excuse the defendant, on the ground that Parliament has 'repealed the covenant'.⁴

(vii) The occurrence of an unexpected event, such as the outbreak of a war, which, without any change in the law, makes performance or further performance of the contract illegal.⁵

(viii) The occurrence of a cause of delay of such probable duration that the object of the contract is defeated⁶ or that its performance at the end of the delay would involve the parties in the performance of a new and different contract.

and *Leiston Gas Co. v. Leiston-cum-Sizewell U.D.C.* [1916] 2 K.B. 428 (C.A.). The last case was doubted in *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C. 265.

¹ In the words of Rowlatt J. in *Distington Hematite Iron Co. v. Possehl & Co.* [1916] 1 K.B. 811, 814.

² See below, chapter 12.

³ (1869) L.R. 4 Q.B. 180.

⁴ *Brewster v. Kitchell* (1697) 1 Ld. Raym. at p. 321; 1 Salk. 198. And see *Eyre v. Johnson* [1946] K.B. 481 for the case of a tenant unsuccessfully alleging prevention by a Defence (General) Regulation from performing a repairing covenant.

⁵ See above, p. 134.

⁶ A delay 'so great and so long as to make it unreasonable to require the parties to go on with the adventure'—per Lord Blackburn in *Dahl v. Nelson, Donkin & Co.* (1881) 6 App. Cas. 38, 53, in reference to *Geipel v. Smith and Jackson v. Union Marine Insurance Co.*

For instance, we may refer to the remarks of Blackburn and Lush JJ. in *Geipel v. Smith*, a charterparty case, quoted above,¹ and recently adopted and elaborated by Lord Wright.² And in *Jackson v. Union Marine Insurance Co.*,³ an action upon a policy of insurance on chartered freight, where the ship went aground, the Court of Exchequer Chamber held that the shipowner could not have maintained an action against the charterer for not loading because the jury had found that 'the time necessary to get the ship off and repairing [*sic*] her so as to be a cargo-carrying ship was⁴ so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers', so that the charterer was justified in throwing up the charter and hiring another ship. In effect, a voyage carried out after the ship had been repaired would have been 'a different voyage'—'different as a different adventure'.⁵

(c) The question whether or not there has supervened an event or circumstance of such a character as to produce frustration is an objective one; that is to say, 'it does not depend on [the parties'] intention or their opinions or even knowledge as to the event'.⁶ 'It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances.'⁷

(d) The event or circumstance which produces frustration must not be attributable to the fault of the party alleging frustration. As Lord Sumner said in the *Bank Line* case:⁸ 'the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration...'. And Lord Wright in delivering the opinion of the Privy Council in *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*⁹ dealt fully and expressly with this point. But the question of the burden of proof has given some difficulty, and it has now been held in the House

¹ At p. 140.

² *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C. 265, 278. In the *Cricklewood* case [1945] A.C. 221, 231, 232, Viscount Simon L.C., in very different circumstances, considered that the unexpired period of a building lease was relevant in assessing the effect of a dislocation resulting from war.

³ (1874) L.R. 10 C.P. 125, 141; and see Bailhache J. in *Admiral Shipping Co. v. Weidner, Hopkins & Co.* [1916] 1 K.B. 429, 436; [1917] 1 K.B. 222, 242.

⁴ That is 'would be', for it appears that at the time of the trial she had not been repaired (8 C.P. 572, 573).

⁵ 10 C.P. at p. 141.

⁶ Per Viscount Maugham in the *Joseph Constantine* case [1942] A.C. 154, 170.

⁷ Per Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co.* [1926] A.C. 497, 510.

⁸ [1919] A.C. 435, 452.

⁹ [1935] A.C. 524; and see *Equitable Steam Fishing Co. v. Cochrane*, Lloyd's List, May 20, 1919, and *Mertens v. Home Freeholds Co.* [1921] 2 K.B. 526.

of Lords in the *Joseph Constantine* case¹ that the party alleging frustration is under no duty to approve affirmatively that there was no default (which is wider than negligence) on his part. If the facts proved raise a presumption of default on his part, then he must rebut that presumption; but if the facts raise no presumption either way, then the party who alleges that the frustration was due to the other party's default must prove it.²

A fortiori, a party who deliberately does something which produces the frustration, e.g. a shipowner who scuttles a ship, cannot rely upon frustration.

(e) The operation of the doctrine of frustration is not excluded merely by the presence in the contract of a clause in which the parties envisage and even make certain provision for the supervening event or circumstance; the presence of the clause shews that the parties had in mind the possibility of the particular event or circumstance supervening, whereupon the question for decision shifts and it becomes necessary to consider (i) whether the words of the clause are apt to cover what has happened, and, if they are, (ii) whether the consequences of the supervening event or circumstance are nevertheless so drastic and disruptive that reasonable men in the position of the parties would not have made the contract they did make if they could have foreseen how disruptive the consequences of the event or circumstance would prove to be. In the words of Lord Haldane in the *Tamplin* case:³

'Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence of itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.'

(f) The operation of frustration by circumstances arising out of a war is not confined to pre-war contracts, though it is clearly more difficult to substantiate a plea of frustration in the case of a contract made after the outbreak of war.⁴ For instance, frustration of a contract

¹ [1942] A.C. 154.

² It is submitted that the rule is the same whether the party alleging frustration is plaintiff or defendant.

³ [1916] 2 A.C. 397, 406. See also *Jackson v. Union Marine Insurance Co.* (*supra*); *Bank Line* case (*supra*); *W. J. Tatem Ltd. v. Gamboa* (*supra*); the *Fibrosa* case (*supra*). *Banck v. Bromley & Son* (1920) 37 T.L.R. 71 appears to be a case where the ice clause in the charterparty 'exactly applied to the events which occurred' and accordingly, those events being within the ambit of the parties' contemplation, the allegation of frustration was rejected.

⁴ The following are some instances of the frustration of contracts made during a war: *Marshall v. Glanville* [1917] 2 K.B. 87; *Federal Steam Navigation Co. v.*

by requisition or other governmental act, such as calling up, can easily arise upon a contract made during the war. The Pre-war Contracts Committee's Report of 1918 pointed out 'that the war did not create its more serious effect on trade, especially in regard to freights, until the Spring of 1915, while no general deficiency of labour was experienced till later in that year'. It remains to be seen whether any bold litigant will be able to establish the frustration of a contract made during the war on the ground that the parties would not have made it if they had foreseen that the war would come to an end so soon.

(2) *The character of its operation.* The operation is automatic; no question arises of either party electing whether or not to maintain the contract, as occurs when a right of rescission occurs. In the words of Viscount Simon L.C. in the *Joseph Constantine* case:¹ 'when "frustration" in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically.' At the same time, it is not the duty of the Court to raise the question of frustration if the parties refrain from doing so, so long as no question of illegality or public policy is involved.²

(3) *The consequences of its operation.* As we have just seen, when frustration operates, it 'kills the contract and discharges both parties automatically'.³ It discharges them from liability for acts of performance not yet due, but how does it affect acts of performance, e.g. the payment of money, which have already taken place, or defaults in acts of performance already due? Until 1942 the leading authority was the decision of the Court of Appeal in *Chandler v. Webster*,⁴ which may be summarized by saying that the loss must lie where it falls⁵

Sir Raylton Dixon & Co. (1919) 1 Ll. L. Rep. 63; *Woodfield Steam Shipping Co. v. J. L. Thompson & Co.* (1919) 64 S.J. 67; *Bank Line v. Arthur Capel & Co.* [1919] A.C. 435.

¹ [1942] A.C. 154, 163, and see Lord Sumner in the *Hirji Mulji* case [1926] A.C. 497, 510.

² Just as it is not the duty of the Court to raise a question of fundamental mistake of a kind which vitiates a contract.

³ In *Heyman v. Darwins* [1942] A.C. 356 the House of Lords questioned Lord Sumner's somewhat incautiously wide statement, in delivering the opinion of the Privy Council in the *Hirji Mulji* case upon the effect of frustration, when operating upon a contract containing an arbitration clause, in bringing that clause 'to an end too' [1926] A.C. 497, 505. It is a matter on which it is difficult to make a general statement, as it must depend to some extent upon the precise wording of the arbitration clause.

⁴ [1904] 1 K.B. 493.

⁵ Note Lord Roche [1943] A.C. at p. 74: 'The true rule, I think, is that in cases of frustration the loss lies where it falls, but that this means where it falls having regard to the terms of the contract between the parties.'

at the moment of the operation of frustration, in the sense that money already paid cannot be recovered back,¹ and that rights already accrued according to the terms of the contract will not be disturbed, so that money already due but not paid must be paid.² This state of the law was the subject of much adverse criticism, and its amendment by legislation was recommended by the Law Revision Committee in their Seventh Interim Report.³ Recently, however, the House of Lords in the *Fibrosa*⁴ case, a war case, received and took the opportunity of reversing the decision in *Chandler v. Webster*, in so far as was necessary in order to hold that where money has already been paid under a contract which in the event is frustrated, and there has been a total failure of consideration for that payment, the sum may be recovered. Accordingly, where a pre-war contract for the supply of machinery from England to Gdynia in Poland was frustrated by the enemy occupation of Poland, the purchaser was allowed to recover the sum of £1000 paid by him to the supplier in pursuance of the contract at the time when the contract was made.⁵ This decision does not deal with all the consequences which are implicit in *Chandler v. Webster* and which are considered to be unjust; but the Law Reform (Frustrated Contracts) Act, 1943,⁶ now gives the Court wide powers to adjust prepayments and other benefits and liabilities as between both the parties to a contract 'which has become impossible of performance or been otherwise frustrated'.⁷

{4} *Suspension clauses.* A clause in a contract which in certain events automatically suspends, or enables a party to suspend, its further performance, is a particular illustration of the clauses already discussed.⁸ Sometimes the effect of these clauses is to suspend during the period of the dominance of a certain event any obligation to perform the

¹ Contrast the law of Scotland which applies the rule of restitution: *Cantiare San Rocco, S.A. v. Clyde Shipbuilding and Engineering Co.* [1924] A.C. 226, and *Penney v. Clyde Shipbuilding and Engineering Co.* [1919] S.C. 363; [1920] S.C. (H.L.) 68. Both are war cases.

² See Lord Russell of Killowen [1942] A.C. at p. 55.

³ Cmd. 6009 of 1939.

⁴ [1943] A.C. 32; for summary, see note by P.H.W. in 58 L.Q.R. (1942), p. 442.

⁵ This decision brings the English law into line with the Scots law illustrated by *Cantiare San Rocco, S.A. v. Clyde Shipbuilding and Engineering Co.* [1924] A.C. 226.

⁶ See the text of the Act and a commentary in Appendix II, p. 411-432.

⁷ Sections 56 and 65 of the Indian Contract Act, 1872, provide for the restoration by a party of any advantage received by him under a frustrated contract.

⁸ Above, p. 93. Many of the cases occurring during the War of 1914 to 1918, in which the contract contained a suspension clause, will be found under 'Impossibility of Legal Performance' in vol. 12 (Contract) of the English and Empire Digest.

contract and to cancel any instalments of performance due during that period; sometimes it is both to suspend and to postpone until the cessation of the inhibiting cause any instalments of performance, e.g. the delivery of ore, or the supply of tonnage, which would otherwise have fallen due during the period of its dominance.¹ Whenever the effect of such a clause is either to 'suspend' or to 'suspend and postpone' performance, then the question can arise whether—quite apart from the clause—performance at a later date would be so different from performance at the time stipulated for and contemplated by the parties as to amount to the performance of a new contract; if so, the Court may hold the original contract to be frustrated.

Thus it will be seen that suspension or suspensory clauses give rise, so far as concerns us, to three problems: (a) whether the clause is apt to cover the war consequences which are present in the case in question; (b) whether, that being so, it would be illegal to give effect to the clause; and (c) whether, in spite of the clause being adequate to cover the events which have happened so as *prima facie* to suspend the operation of the contract and in some cases *pro tanto* prolong its duration, the events which have happened transcend in their effects the disturbing factors which the parties had contemplated in agreeing upon the clause and are such as to attract the doctrine of frustration.

Problem (a) depends upon the circumstances of each case. Problem (b) has already been discussed² and may here be dismissed shortly as follows: even when the clause provides for complete cessation of intercourse with the enemy and does not stop short of that, e.g. by merely suspending deliveries, it is illegal and void on the ground of public policy if to give effect to it is to cause a detriment to this country or an advantage to the enemy, even in the future, as for instance by enhancing the post-war resources of the enemy or crippling our own.³

Problem (c) requires comment. Whereas an exceptions clause contains a list of events or 'excepted perils' the occurrence of which excuses one party or sometimes both parties from further performance of the contract at any time, however remote, the object of a suspension clause is either merely to cancel the instalments of performance due during the operation of the inhibiting cause, or to preserve the right to performance until such time as it may be possible. Where, therefore, the words of a suspension clause are apt to cover an event causing delay or dislocation,

¹ E.g. *Pacific Phosphate Co. v. Empire Transport Co.* (1920) 36 T.L.R. 750.

² Above, pp. 93-96.

³ *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. 260.

the right to performance (apart from questions of illegality as in the *Ertel Bieber* case) goes into temporary abeyance until the cause ceases to operate. The parties have foreseen both the event and the character and dimensions of its consequences and have stipulated that it shall not dissolve the contract or excuse all further performance but shall either cancel certain instalments of performance or postpone them until they become possible, as the case may be. Accordingly, the law will give effect to their stipulation. When, however, the event and its consequences, though falling within the letter of the clause, are so sweeping and destructive in character and extent that the parties cannot be said to have stipulated for what should happen, the presence of the clause will not prevent the doctrine of frustration from applying.

Lord Haldane in the *Tamplin* case put the matter thus:¹

'There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.'

A good instance of this proposition is to be found in *Pacific Phosphate Co. v. Empire Transport Co.*² In *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*,³ McCardie J. discussed a suspension clause, but his remarks were *obiter*—very *obiter*, for there were several other and better points upon which the case had been decided. His judgment, however, should be noted, both for his analysis of the word 'suspend'⁴ and as an instance of his willingness to apply the doctrine of frustration

¹ [1916] 2 A.C. 397, 406. The relevant clause in the charterparty (which was for a period of sixty months) did not contain any provision for prolonging the charterparty to the extent that its performance might be suspended. 'The time [of the Admiralty requisition] might extend until after the period of the charterparty had run out' (at p. 411).

² *Supra*.

³ [1918] 1 K.B. 331; affirmed [1918] 2 K.B. 486.

⁴ Above, p. 98.

in the events which had happened, even on the assumption that the suspension clause was apt to cover the war between Great Britain and Austria. 'A clause,' he said, 'though broad in its meaning, may not cover a set of facts so fundamental and far-reaching in extent and operation and so prolonged in duration as to change the whole circumstances of the contract and the character of its performance.'¹

(5) *Behaviour of a party about to allege frustration.* In the *Taylor v. Caldwell* type of case, when the destruction occurs, the fact of the physical impossibility of performing the contract is patent, and there is nothing more to be said about it. There is no occasion for either of the parties to calculate probabilities, to wonder how long an interruption or difficulty will last; there is no need for a weighing up and determination upon the matter. But frustration is not a physical fact but an intellectual conception. When it operates, it does so automatically, and for both parties, and not by reason of the election of either.² Nevertheless, before a party to a contract claims that it is frustrated, he must do some thinking and come to a decision. If both parties agree, *cadit quaestio*. If they do not agree, or if they cannot or do not get into touch with one another, one of them will have to decide whether or not he considers the contract to be frustrated, and he will be answerable to a Court of law subsequently for the results of his decision.

Several questions thus arise.

(a) Will it suffice that the decision is subjective, that is, his own *bona fide* opinion, or must it be objective, such as an impartial third party might properly have arrived at?

(b) How long must a party wait before claiming that the contract is frustrated?

(c) Does the validity of the decision depend upon the facts so far as they could be ascertained by the party who made the decision at the time when he made it?

As to (a), clearly the decision, though the decision of one party, must be an objective one. As Bailhache J. once put it:³

'The question will then be what estimate would a reasonable man of business [Lord Bowen's shipowner or charterer travelling up to the City on the top of the Clapham omnibus] take of the probable length of the withdrawal of the vessel from service with such materials as

¹ [1918] 1 K.B. at p. 339.

² See Lord Sumner [1926] A.C. at pp. 509, 510.

³ In *Anglo-Northern Trading Co. v. Emlyn Jones and Williams* [1917] 2 K.B. 78, 85.

are before him, including, of course, the cause of the withdrawal, and it will be immaterial whether his anticipation is justified or falsified by the event.'

Questions (b) and (c) can arise whatever the frustrating cause may be, but frustrating causes produced by war raise some special problems of their own, to which we must devote a few remarks.

(b) In the eye of the law the essence of war is the uncertainty of its duration. This rule has been laid down time after time. Lord Shaw once called it a 'presumption'.¹ In *Esposito v. Bowden*² occurs the expression 'a war, the end of which cannot be foreseen'. Lush J. in *Geipel v. Smith* said:³ 'A state of war must be presumed to be likely to continue so long, and so disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.' The Court will not speculate upon the duration of a war.

In some cases the frustrating cause is inseparably connected with the war and must, humanly speaking, last as long as the war; for instance, where the named source of supply of goods is an enemy country, in which case the mere outbreak of war discharges the contract on the ground both of illegality and of frustration,⁴ or where a ship is detained in an enemy port, subject to the bare possibility of days of grace, which did not materialize in the War of 1914 to 1918 and have not materialized in the recent war as Great Britain denounced Hague Convention VI in 1925.⁵ But where the frustrating cause is not something inseparably connected with the war though produced by it, something which inherently must last as long as the war, but is only something which would not have happened but for the war, for instance, the action of the Legislature or the Executive, it is necessary for a party who wishes to allege frustration to walk more warily and not to do anything which indicates indecent haste.

We say nothing of *Hadley v. Clarke*,⁶ for that decision—upon the temporary character of an embargo removed after two years—has been seriously discredited.⁷ In *Geipel v. Smith*,⁸ where the cause of the frustration was the blockade of Hamburg by the French fleet, Cockburn C.J. said: 'At all events it must be taken that the restraint must

¹ [1916] 1 A.C. at p. 510. See also at p. 507.

² (1857) 7 El. & Bl. 763, 791.

³ (1872) L.R. 7 Q.B. at p. 414.

⁴ *In re Badische Co. (supra)*.

⁵ *Embiricos v. Reid* [1914] 3 K.B. 45; *Horlock v. Beal (supra)*.

⁶ (1799) 8 T.R. 259.

⁷ E.g. in *Horlock v. Beal (supra)*, and the *Metropolitan Water Board's case* [1918] A. C. 119.

⁸ (1872) L.R. 7 Q.B. 404.

cease within a reasonable time, and that the duty of the defendants was to wait only a reasonable time prepared to carry out their contract should the restraint be removed';¹ and Blackburn J. said² that the effect of a blockade of the port of discharge is 'that, after a reasonable time it relieves the parties, the contract being altogether executory, from the performance of it'.

In *Andrew Millar & Co. v. Taylor & Co.*³ there were pre-war contracts between English purchasers and Irish vendors for the supply and export of confectionery to what became a neutral port, Mogador. The alleged frustrating cause was the issue of general Proclamations under the Customs and Inland Revenue Act, 1879, on August 5 and 10, 1914, prohibiting the export of (*inter alia*) confectionery. On August 20 the prohibition upon the export of confectionery was removed. No specific date for export had been stipulated, and in the ordinary course of events shipment would have taken place within a reasonable time, probably in August or September. On August 14 the vendors purported to 'cancel' the contracts—in effect repudiated them. The Court of Appeal held that the vendors had been too precipitate; that they should have waited for a reasonable time before treating the contracts as impossible of performance, and that the contracts were not in the event frustrated. Warrington L.J. in a short and illuminating judgment points out the distinction between illegality which 'arises *ipso facto* from a state of war' and impossibility which may or may not be the result of an act of the Executive. The same necessity of waiting a reasonable time appears from *Geipel v. Smith*.⁴ This rule does not touch the case where the operative cause is so conclusive as to 'discharge the contract at once, for in such a case it would be unreasonable to demand delay.

A remark by Lord Dunedin in the *Metropolitan Water Board's* case⁵ is suggestive: 'But to make what I may call a clean case of illegality the illegality must be permanent', as it was held to be in that case. 'Permanent', in the mouths of lawyers as of laymen, does not mean eternal. It means rather that at present the end of the duration cannot

¹ At p. 410.

² At p. 412.

³ [1916] 1 K.B. 402 (C.A.).

⁴ L.R. 7 Q.B. at p. 410 (a blockade). *Austin, Baldwin & Co. v. Wilfred Turner & Co.* (1920) 36 T.L.R. 769 is also a warning against assuming too hastily that, once a licence to import is refused, that is an end of the contract and frustration is established; in that case a restriction upon importation was removed after a few weeks and within the period during which delivery would have been in compliance with the contractual obligation to deliver within a reasonable time. Avory J.'s remark should be noted: 'I think it was the defendants' duty to wait a reasonable time to see if permission could (? would) have been granted later.'

⁵ [1918] A.C. 119, 128.

be foreseen. The remark is described as suggestive because it helps to explain why pre-war contracts which involve intercourse with the enemy (whether an enemy is a party or not) are completely destroyed and not merely suspended. The reason is that in the eye of the law the duration of a war is 'permanent'. The law will not permit the Courts to speculate upon the duration of a war, 'the end of which cannot be foreseen'.¹ An illegality not arising from the fact that performance would involve intercourse with the enemy may be 'temporary' in the eye of the law and may not result in the discharge of the contract; for instance, *Andrew Millar & Co. v. Taylor & Co.* (*supra*). But it will be noted that in *Esposito v. Bowden*² the effect of the illegality (arising from the prosecution of a voyage to an enemy port, Odessa) was not undone by the fact that within nineteen days of the outbreak of war a British Order in Council was issued permitting a British subject to trade by means of a neutral ship (as the ship in this case was) with non-blockaded Russian ports, of which Odessa was one.³

We think we can safely say that before a party to a contract can claim that it has been frustrated he must do what is in his power to avoid that fate. For instance, if a charterer has power to direct a ship either to a United Kingdom port or to a Danish port and, owing to a system of rationing of nitrate soda imposed by Great Britain upon Danish imports during a war, no Danish port is available because the year's ration has already been imported, it is useless for the charterer (or his assignee) to nominate a Danish port and then to claim damages for the shipowner's failure to go there, and the captain was justified in discharging his cargo at a United Kingdom port.⁴

Similarly, if a Government prohibition takes the form of making some act illegal unless a licence to do it is obtained, it is the duty of the party whose act is thus made illegal without a licence to bestir himself and apply for a licence promptly; if he fails to do so, he cannot plead that the contract has been frustrated.⁵

¹ See *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C. 265, 278.

² (1857) 7 El. & Bl. 763.

³ The doctrine of the *Ertel Bieber* case (*supra*), that the suspension of obligations towards an enemy until after the war confers a benefit upon him and imposes an injury upon this country affords another, and historically later, reason.

⁴ *Aktieselskabet Olivebank v. Danske Svoovlsyre Fabrik* [1919] 1 K.B. 388; 2 K.B. 162. According to *Banks L.J.* (2 K.B. at p. 167), *Bailhache J.* held that the contract was frustrated by the defendant's nugatory nomination of a Danish port, but this does not appear from the judgment of *Bailhache J.* as reported.

⁵ *In re Arbitration between Anglo-Russian Merchant Traders and John Batt & Co.* [1917] 2 K.B. 679; *J. W. Taylor & Co. v. Landauer & Co.* [1940] 4 All E.R. 335.

(c) A party is entitled to base his determination upon the facts available within a reasonable time and does not take the risk of an early and unexpected removal of the cause of disappearance. Scrutton J. made some valuable observations on this point in *Embircos v. Reid*:¹

'If there is such a likelihood and probability [defeat and destruction of the object of a commercial venture by the detention of a ship in an enemy port] the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event, and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed.'

He then quoted Lord Gorell in *The Savona*² and continued:

'Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not;³ they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.'⁴

Lord Sumner in the *Bank Line* case made some remarks to the same effect:⁵

'The probabilities as to the length of the deprivation and not the certainty after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do... Rights ought not to be left in suspense or to hang on the chances of subsequent events.'

It is submitted that the test can be stated as follows: Would a reasonable man in the position of the party alleging frustration, after taking all reasonable steps to ascertain the facts then available, and without snapping at the opportunity of extricating himself from the contract, come to the conclusion that the interruption was of such a character and was likely to last so long that the subsequent performance or further

¹ [1914] 3 K.B. 45, at p. 54. The fact that the detention was an excepted peril, 'restraint of princes', must not obscure the fact that this is a frustration case.

² [1900] P. 252, at p. 259.

³ Approved by Lord Sumner in *Watts, Watts & Co. v. Mitsui & Co.* [1917] A.C. 227, 246; but when to an action on a charterparty the exception of 'restraint of princes' is pleaded, there must be an actual 'restraint of princes': 'Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension' (per Lord Dunedin at p. 238).

⁴ Here again (see p. 139 above) there is a certain resemblance to constructive total loss: see section 60 of the Marine Insurance Act, 1906, and *Marstrand Shipping Co. v. Beer* (1936) 56 Ll. L. Rep. 163, 173.

⁵ [1919] A.C. at p. 454.

performance of the contract would really amount to the performance of a new contract? If so, there is frustration. And in considering the probability of the duration, he is entitled to assume that in so far as the outbreak or the existence of a war is the cause of the interruption that cause is of uncertain duration. Moreover, the Court will not let him suffer for a determination thus reached if subsequent unexpected events shew that he was unduly pessimistic in his forecast.¹

OTHER INTERFERENCE WITH PERFORMANCE OF CONTRACT

We now come to some kindred instances of interference with the performance of contracts arising from war and its consequences.

(a) *Bailees generally, and the defence of 'King's enemies' in particular.*

'In broadest outline the position at common law is that the ordinary bailee (i.e. any person having in his possession goods of another for whatever purpose) is only liable for negligence and accordingly, subject to any express assumption of absolute liability contained in the contract out of which the bailment arises, he would not be liable for war damage occurring without his negligence...'

So runs paragraph 20 of the Report of the Committee on Liability for War Damage to the Subject-Matter of Contracts.² The Committee then point out that common carriers and common innkeepers are 'entitled to rely upon the implied exception of act of God or King's enemies'. After quoting Blackburn J. in *Taylor v. Caldwell*³ upon the liability of the ordinary bailee as follows:

'It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.'

the Report continues:

'The exceptions to this rule are (1) where the bailee keeps the goods after the bailment is properly determined, and (2) where the bailee departs from the terms of his bailment, e.g. keeps the goods in the wrong place or deviates. In these excepted cases the bailee is under an absolute liability for all loss, including loss by King's enemies.'

¹ Compare cases of constructive total loss, e.g. *Polarian Steamship Co. v. Young* [1915] 1 K.B. 922 (C.A.).

² Cmd. 6100 of 1939.

³ (1863) 3 B. & S. 826, 838.

'King's enemies'¹ means primarily enemies in the international sense, but probably includes persons engaged in a domestic rebellion supported by an army and amounting to more than a mere local disturbance.

(b) *Liability for War Damage (Miscellaneous Provisions) Act, 1939*. This Act, which emanated from the Report of the Committee mentioned in the previous section, defines 'loss by war' and 'damage by war' for the purposes of the Act as meaning 'respectively loss (including destruction) and damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by or in repelling enemy action', and provides, *in certain circumstances*, for relief or increased relief from liability in respect of such loss or damage for bailors and for bailees, for buyers and potential buyers of goods delivered 'on approval or on sale or return or other similar terms' or on condition of liability to pay the price of the goods in the event of their being lost or damaged before the property passes, for innkeepers and for pawnbrokers. It also contains provisions for the relief of hardship arising in certain cases from liability in respect of customs and excise duties.

(c) *The Ministry of Supply Act, 1939*, s. 7 (7) provides that

'Where the failure to fulfil any contract, whether made before or after the commencement of this Act, is due to the compliance on the part of any person with any directions given by the Minister under this section, proof of that fact shall be a good defence to any action or proceeding in respect of the failure.'

This provision does not necessarily exhaust the consequences of compliance with the directions of the Minister, for their effect may be to frustrate the contract entirely. Other machinery also exists for the relief of parties to contracts who have been adversely affected by war circumstances.²

(d) *The Limitation of Supplies (Miscellaneous) Order, 1940*,³ paragraph 4, enabled a party to a 'contract of sale or for work, labour and materials

¹ As to innkeepers, see the *Marshal of the Marshalsea's* case (1455) Y.B. Hil. 33 Hen. VI. fol. 1, pl. 3, discussed in Holmes, *The Common Law*, pp. 177, 200. As to carriers, see the *Marshal of the Marshalsea's* case, *supra*; Scrutton, *Charterparties and Bills of Lading*, Article 81; Carver, *Carriage by Sea*, section 11; and Macnamara, *Carriers by Land*, Article 31; *Curtis v. Mathews* [1918] 2 K.B. 825; *Sec. of State for War v. Midland Great Western Railway of Ireland* [1923] 2 I.R. 102. The expression when occurring in a bill of lading or a charterparty appears to include the public enemies of the shipowner's State: *Russell v. Niemann* (1864) 17 C.B. (N.S.) 163.

² See *Butterworth's Emergency Legislation Service*, Statutes Supplement No. 18, p. 178.

³ S.R. & O. 1940, No. 874.

in pursuance of which any goods comprised in any class of controlled goods are to be supplied, otherwise than by importation or exportation', in certain circumstances and upon certain conditions, to discharge the contract by seven days' notice to the other party; but it was superseded by S.R. & O. 1940 No. 2031, when the special circumstances necessitating it had ceased to operate.

(e) *Express term.* The parties may have expressly provided in their contract that the fact of war or the consequences of war shall afford a defence.

An early recognition of the need of making special provision against the occurrence of war is found in the year 1340 in Y.B. Pasch. 14 Edw. III¹ where it appears that in a charter of the King granting to the Abbot of Ramsey and his successors the right of holding a fair at St Ives in return for a rent of £50 since assigned to the plaintiff in this case, it was provided in the King's charter that

'if the merchants should be disturbed by reason of war in his realm, so that they could not come there nor make their profit, the suit of the fair should cease for the time'.

The report continues:

'and we tell you that by reason of the war between the King and the French the merchants, etc., have been hindered from coming there; judgment whether for that time we shall, in opposition to the charter, be charged.'

Ultimately it was held that there had been no war 'in his realm', and the plaintiff recovered.

Again, the parties may have expressly excluded war and its consequences from the ambit of their contract, for instance, a policy of insurance, which is not the same thing as pleading war and its consequences as a defence. Thus, after the Agadir incident in 1911, it became almost universal for marine insurance policies to contain some form of F.C. and S. clause—'Warranted free of capture, seizure, arrest, restraint, or detainment and the consequences thereof, etc....' leaving the owner of the property free to effect a separate insurance against war risks, or to arrange with his underwriters to delete this clause upon payment of an extra premium.

It is important to recognize that when the parties to a contract use the expression 'war', 'warlike operations' or some similar expression, the problem before the Court is to decide not whether there exists what

¹ Rolls Series, p. 126, and see note at p. xv in the Introduction.

international law or English municipal law would regard as 'war',¹ but to assign to the expression the ordinary meaning which a person of common sense would assign to it in the relevant context.²

Again, expressions such as 'restraint of princes'³ and 'restraint of peoples'⁴ frequently cover the consequences of war and warlike operations, and the Courts are constantly being called upon to construe them.⁵

(f) *Supervening impossibility created by destruction of or injury to an essential person or thing may be such as to discharge a contract.* If the Surrey Music Hall had been destroyed by enemy action instead of a domestic fire, the effect upon the contract before Blackburn J. in *Taylor v. Caldwell*⁶ would have been the same. If Mrs Davison had been prevented by injury due to enemy action instead of illness from performing her contract to play the piano, the effect, illustrated by the decision in *Robinson v. Davison*,⁷ would have been the same.

(g) An illustration of what may perhaps be called 'statutory frustration' will be found in section 33 of the Exchange Control Act, 1947, (which incidentally reflects the theory of the implied term as the basis of the doctrine) as follows:

'33.—(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required.

Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason.'

¹ See chapter I.

² *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantam Steamship Co.* [1939] 2 K.B. 544 (C.A.).

³ *Watts, Watts & Co. v. Mitsui & Co.* [1917] A.C. 227.

⁴ For the application of this expression to revolutionary disturbances, see *Soc. Belge des Betons S.A. v. London & Lancashire Insurance Co.* [1938] 2 All. E.R. 305.

⁵ See, for instance, Scrutton, *op. cit.*, Article 82, and Arnould, *Marine Insurance*, §§ 832-834.

⁶ (1863) 3 B. & S. 826.

⁷ (1871) L.R. 6 Ex. 269.

CHAPTER 7

TRADING WITH THE ENEMY

Having endeavoured to state in chapters 4 and 6 the general principles relating to the effect of war upon contracts, we must now illustrate those principles by referring to some typical cases upon particular contracts. Before doing that, however, it will be useful to say something upon a general expression 'trading with the enemy', which is wider than 'contracting with the enemy' and, according to some authorities, is derived from a different source.

'Trading with the enemy' denotes a criminal offence, a cause of illegality and nullity in a contract or other transaction, and a ground of condemnation by the Prize Court. In due course we shall examine its present scope and meaning and it will suffice for the present to say that it is, at any rate to-day, equivalent to 'intercourse or contact with the enemy', that is to say, with the enemy in the territorial sense, for we are not aware that it has ever been criminal or illegal by the common law or the law maritime to hold intercourse, otherwise lawful, with an enemy national in England.¹

The prohibition of 'trading with the enemy' is of respectable antiquity.² Lord Mansfield in *Gist v. Mason*³ refers to 2 Rolle's Abridgment, 173, *Guerre*, where mention is made of a licence granted in the thirteenth year of the reign of Edward II by the keepers of the truce (*custodes treuge*) 'to certain men to go and sell and buy their merchandise in Scotland which was then an enemy of the King', a thing clearly illegal, if not criminal, without a licence, and also states that in the reign of William III the King's judges on being asked whether it was a crime to carry corn to the enemy in time of war replied that it was a misdemeanour. Valuable examinations of the historical aspect of the prohibition will be found in Lord Stowell's judgment in *The Hoop*⁴ in 1799, the arguments of counsel in *Potts v. Bell*⁵ in 1800, and the judgment of Willes J. in *Espósito v. Bowden*⁶ in 1857.

¹ But if a company registered in England acquires enemy character by reason of being under the *de facto* control of enemies in the territorial sense, dealings with it amount to 'trading with the enemy', both at common law (see Lord Parker [1916] 2 A.C. at p. 345) and by statute. *Quaere* also, dealings with an individual in this country who adheres to the enemy?

² See Holdsworth, *History of the English Law*, ix, pp. 99 *et seq.*

³ (1786) 1 T.R. 88.

⁴ 1 C. Rob. 196.

⁵ 8 T.R. 548. In *Willison v. Patteson* (1817) 7 Taunt. 439, 449, Park J. said: 'Before the case of *Potts v. Bell*, there was an opinion prevalent in Westminster Hall, that the commerce with an enemy was not illegal.'

⁶ 7 El. & Bl. 763.

BASIS OF THE RULE

Many sources or explanations of the prohibition have been put forward from time to time, of which we shall mention the following:

(i) Per Lord Stowell in *The Hoop*,¹ there is

'a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law....'

Upon this it is fair to say that it is controversial whether there is any such rule in international law, and that according to the law of many or most European countries there is no *ipso facto* prohibition of intercourse, though the Government of any belligerent State may lawfully prohibit it to its subjects. This decision shews that innocence or ignorance is no defence, for the claimants to the condemned property—Glasgow merchants—had been informed by the Commissioners of Customs at Glasgow that existing Orders in Council permitted this trade with Rotterdam, although this country was at war with Holland.²

(ii) That war involves personal enmity between the nationals of the opposing States. Perhaps the judgment of the United States Supreme Court in *The Rapid*³ contains the best exposition of this view. In that case an American citizen, upon the outbreak of the Anglo-American War of 1812 to 1814, prudently sent a ship to a British island near Nova Scotia in order to remove to the United States property belonging to him and deposited there 'a long time ago', and the ship and goods were captured by an American privateer on the voyage home. The voyage involved no commercial transaction with the enemy, and the purchase of the goods from England and their deposit on the British island had taken place before the war broke out, so that 'it was all pure gain to the Americans'.⁴ The goods, being libelled in prize by the captor, were condemned to him. Johnson J. based the opinion of the Court upon the personal enmity of the nationals of the opposing States.

'In the state of war [he said] nation is known to nation only by their armed exterior; each threatening the other with conquest or annihila-

¹ (1799) 1 C. Rob. 196, 198.

² See also for innocence, *The Panariellos* (1915) 31 T.L.R. 326; (1916) 32 T.L.R. 459.

³ (1814) 8 Cranch 155, 160. It is unnecessary to stress the relevance of these early decisions of the American Supreme Court in a sphere which great American judges expressly acknowledge to be a common inheritance with England.

tion. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat... The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country.'

It is this doctrine of personal enmity against which Rousseau protested in his often quoted passage in the *Contrat Social*:¹

'La guerre n'est donc point une relation d'homme à homme, mais une relation d'Etat à Etat, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non comme membres de la patrie, mais comme ses défenseurs'—

a conception of war which, after being adopted by the French Prize Court at the beginning of the nineteenth century, has obtained a considerable hold upon the European Continent.

It must be noted that the reason given in *The Rapid* proves too much because it applies with almost equal force to enemies in our midst who are not enemies in the territorial sense.

(iii) Again, per Lord Stowell in *The Hoop*—the prohibition is based upon 'the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other'.² As we have seen in chapter 3 the common law rule which imposes procedural disability upon enemies is not in any way associated with 'trading with the enemy' and was laid down at a time when the King's Courts did not deal with mercantile transactions, so that it cannot be said that the disability is a corollary of the prohibition. Moreover, in the early days the disability seems to have applied to enemies generally, and not merely to enemies in the territorial sense with whom 'trading' was prohibited.

(iv) In the words of Willes J. in delivering the judgment of the King's Bench in *Esposito v. Bowden*³ in 1857,

'it is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse

¹ I C. 4.

² At p. 200. See Lord Sumner's remarks in *Rodriguez v. Speyer Brothers* [1919] A.C. 59, 122, upon the different origins of the prohibition against trading with the enemy and the plea of alien enemy.

³ (1857) 7 El. & Bl. 763, 779.

and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the licence of the Crown, is illegal.'

In the *Clapham Steamship Co.'s* case,¹ Rowlatt J., in holding that a pre-war charterparty was abrogated because it benefited or supported the enemy during the war, said that in basing his decisions on this ground 'I am applying what I conceive to be the principle which lies at the root of the rule which makes trading with the enemy illegal'.

It is clear that this modern explanation, of which there are traces earlier than 1857, does not explain a case like *The Rapid*,² where there was no conceivable benefit to the enemy.

(v) The danger of the leakage of information if intercourse with the enemy, that is to say, across the line of war, were permitted. Lord Stowell said in *The Hoop*:³

'Who can be insensible to the consequences that might follow if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that had the means of carrying on any other species of intercourse he might think fit?'

In *Potts v. Bell* one of the grounds urged by counsel for the successful litigant was that 'the intercourse which [trading with the enemy] creates between subjects of hostile States necessarily tends to facilitate the conveyance of intelligence to the enemy'. And in the *Ertel Bieber* case⁴ one of the grounds upon which Lord Dunedin and Lord Atkinson based the illegality of a contract with the enemy in the territorial sense was, in the words of the former,⁵ that it 'gives opportunities for the conveyance of information which may hurt the conduct of the war'.

COMMON LAW

Whatever the true explanation may be, it is clear that by the common law 'trading with the enemy' is both criminal and illegal and that it vitiates both the actual contract,⁶ if any, involved in it, and any ancillary contract, such as affreightment or insurance.⁷ It is not con-

¹ [1917] 2 K.B. 639, 646.

² Above, p. 171.

³ At p. 200. It is on this ground that in the opinion of Dr. Baty (31 L.Q.R. (1915), pp. 30-49) the prohibition of trading with the enemy rests. This article is of particular value from the historical point of view and examines both the English and the American cases.

⁴ [1918] A.C. 260.

⁵ At p. 274.

⁶ If neither of the parties raises this objection, it is the duty of the Court to do so: *Evans v. Richardson* (1817) 3 Mer. 469.

⁷ *Potts v. Bell* (1800) 8 T.R. 548.

fined to ordinary commercial transactions¹ and covers intercourse which may have nothing commercial about it. The prohibition applies equally to the subjects of an ally as to British subjects, and will be enforced by our Courts against them.² This is more likely to happen in Prize Court proceedings³ than in others, but in *Kreglinger & Co. v. Cohen, trading as Samuel and Rosenfeld*,⁴ Bray J. held that it was equally illegal for the subject of an ally to trade with the enemy.

Criminally, it appears from *Gist v. Mason*⁵ that, according to the opinion of all the Judges 'in King William's time' therein referred to, trading with the enemy is a misdemeanour, and we are told⁶ that Lord Mansfield, when Solicitor-General, admitted this *arguendo* in 1749.

BY STATUTE AND DEFENCE REGULATIONS

The common law relating to 'trading with the enemy' is now controlled and supplemented by the Trading with the Enemy Act, 1939, as amended from time to time by Defence Regulations. There is nothing in the Act to indicate that it is not a permanent statute, and it repeals all but a trifling part of the Trading with the Enemy legislation of the War of 1914 to 1918. The Act defines the offence, specifies the penalties and defines 'enemy';⁷ provides for the inspection and supervision of businesses; and prohibits, except by licence, the transfer of negotiable instruments and choses in action by enemies and the transfer of securities by or to enemies and the allotment of securities to them.

The principal provisions of the Act for our present purpose, as amended, are as follows:⁸

Penalties for trading with the enemy

I. (1) Any person⁹ who trades with or attempts to trade with the enemy within the meaning of this Act shall be guilty of an offence of trading with the enemy, and shall be liable—

¹ For an instance of barter, see *Van Zyl v. Pienman* (1906) 23 S.C. 469; 16 C.T.R. 730 (cited in *English and Empire Digest*, vol. 2)—a South African case.

² *The Panariellos* (1915) 31 T.L.R. 326; (1916) 32 T.L.R. 459; *The Nayade* (1802) 4 C. Rob. 251; *The Neptunus* (No. 5) (1807) 6 C. Rob. 403—not a very clear case because the traders in the allied country were British subjects.

³ See later, p. 181.

⁴ (1915) 31 T.L.R. 592.

⁵ (1786) 1 T.R. 88. In *The Odin* (No. 1) (1799) 1 C. Rob. 248, 251, Lord Stowell refers to trading with the enemy as a 'criminal transaction'.

⁶ By Sir John Nicholl *arguendo* in *Potts v. Bell* (1800) 8 T.R. 548, 556.

⁷ See Parry in 4 *Modern Law Review* (1941), pp. 161–182.

⁸ See a useful publication from H.M. Stationery Office entitled 'Trading with the Enemy Legislation in force... on 31st July, 1946'.

⁹ Not a British subject in enemy territory—see Attorney-General in *Hansard, Commons* (Dec. 15, 1944), col. 1583.

- (a) on conviction on indictment, to penal servitude for a term not exceeding seven years or to a fine or to both such penal servitude and a fine, or
- (b) on summary conviction, to imprisonment for a term not exceeding twelve months or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine;

and the court may in any case order that any goods or money in respect of which the offence has been committed shall be forfeited.

(2) For the purposes of this Act a person shall be deemed to have traded with the enemy—

- (a) if he has had any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy, and, in particular, but without prejudice to the generality of the foregoing provision, if he has—
 - (i) supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy, or traded in, or carried, any goods consigned to or from an enemy or destined for or coming from enemy territory, or
 - (ii) paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory, or
 - (iii) performed any obligation to, or discharged any obligation of, an enemy, whether the obligation was undertaken before or after the commencement of this Act; or
- (b) if he has done anything which, under the following provisions of this Act, is to be treated as trading with the enemy,

and any reference in this Act to an attempt to trade with the enemy shall be construed accordingly.

Provided that a person shall not be deemed to have traded with the enemy by reason only that he has—

- (i) done anything under an authority given generally or specially by, or by any person authorised in that behalf by, a Secretary of State, the Treasury or the Board of Trade, or
- (ii) received payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving payment had already been performed when the payment was received, and had been performed at a time when the person from whom the payment was received was not an enemy.

(3) Any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy.

(3 A) and (4). Omitted.

Definition of enemy

2. (1) Subject to the provisions of this section, the expression 'enemy' for the purposes of this Act means—

(a) any State, or Sovereign of a State, at war with His Majesty,

(b) any individual resident in enemy territory,

(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,

(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty,

and

(e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business;

but does not include any individual by reason only that he is an enemy subject.

(2) The Board of Trade may by order direct that any person specified in the order shall, for the purposes of this Act, be deemed to be, while so specified, an enemy.¹

Interpretation

15. (1) In this Act the following expressions have the meanings hereby respectively assigned to them:

'enemy subject' means—

(a) an individual who, not being either a British subject or a British protected person, possesses the nationality of a State at war with His Majesty, or

¹ In pursuance of this power the Board of Trade issued from time to time lists of persons who were for the purposes of the Act deemed to be enemies. The first of these Orders was S.R. & O. 1939, No. 1166. These Lists of Specified Persons have now been revoked: S.R. & O. 1946, No. 1041, and see Nos. 1040, 1042 and 1044. Not also the United States of America's Proclaimed List of certain 'blocked' nationals which was promulgated in the United States in pursuance of the President's Proclamation of July 17, 1941, and embraced all the names contained in the United Kingdom lists of Specified Persons and others in addition.

(b) a body of persons constituted or incorporated in, or under the laws of, any such State; and

'enemy territory' means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty.

(1 A) The Board of Trade may by order direct that the provisions of this Act shall apply in relation to any area specified in the order as they apply in relation to enemy territory, and the said provisions shall apply accordingly.

(2) Omitted.

(3) In considering for the purposes of any of the provisions of this Act whether any person has been an enemy or an enemy subject, no account shall be taken of any state of affairs existing before the commencement of this Act.

A few comments are required.

(i) It should be noted as a feature of the recent war how widely the scope of the definition of enemy in the territorial sense was extended as a result of the provisions of this Act, as amended by the Defence (Trading with the Enemy) Regulations, and Orders made by the Board of Trade in pursuance of the power conferred upon it by those Regulations, which inserted in the Act, section 15, subsection 1 A, printed above. In the exercise of this power the Board of Trade applied the provisions of the Act to the non-enemy territory mentioned below.¹ In addition the certificate of a Secretary of State is made by subsection 2 of section 15 conclusive on the question of the fact of any area at any time becoming or ceasing to be under the sovereignty or occupation of any power. Reference should be made to chapters 17 and 18 of this book entitled 'Belligerent Occupation' and the cases there cited.

(ii) The generality of the offence as defined in subsection 2 (a) of section 1 should be noted—'any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy'.

(iii) It is not forbidden to receive payment of money from an enemy²

¹ Orders were made under this power applying the Act to the formerly Un-occupied Zone of France, including Corsica and Algeria, the French Zone of Morocco and Tunisia, to other countries which were or had been under enemy occupation, and to some which without formal occupation had been dominated by enemy influence. And note S.R. & O. 1943, No. 1034, which maintains certain British control and restrictions over property in the United Kingdom belonging to persons and firms resident or carrying on business in areas ceasing to be, or to be treated as, enemy territory until such time as the Board of Trade may by order specify.

² For an instance from the War of 1914 to 1918 see *Halsey v. Lowenfeld* [1916] 2 K.B. 707 (C.A.).

in respect of a transaction under which the recipient had performed all his obligations when the payment was received and while the payer was not an enemy. Another instance of permitting an enemy to make payments in this country occurred in connexion with Patents, Trade Marks and Designs under General Licences, referred to later,¹ so long as those General Licences were in force.

(iv) Quite apart from the saving of the rights of the Crown contained in section 16, the power of the Crown to grant general or special licences to trade is implicit in proviso (1) to subsection 2 of section 1 of the Act.

(v) The Act by subsection 1 (c) of section 2 adopts (extending it to unincorporate bodies) the famous *Daimler* test of the enemy character of corporations, which we have already discussed.²

Reference should be made to some of the decisions given upon the legislation of the Wars of 1914 to 1918 and 1939 to 1945. The expression 'for the benefit of an enemy' occurs both in the legislation of the War of 1914 to 1918 and in the Trading with the Enemy Act, 1939. The decision of the Court of Criminal Appeal in *R. v. Kupfer*³ shews that these words have a wide application. Lord Reading C.J. said of them that they

'were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for these words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. It was doubtless considered that it was necessary... to throw the net wide in order that there should not be this means of evading the law and therefore of assisting the enemy by adding to or protecting his resources.'

Accordingly where the London partner of a firm which also comprised two partners at Frankfurt-am-Main (the firm being *ipso facto* dissolved by the outbreak of war) paid during the war to a person in a neutral State a pre-war debt which had become due from the firm as the result of a transaction between the neutral and the Frankfurt partners, thus extinguishing the obligations of the latter, it was held that the London partner was rightly convicted of having made a payment 'to or for the benefit of an enemy'.

In *Stockholms Enskilda Bank Aktiebolag v. Schering Ltd.*⁴ a British

¹ P. 183.

² Above, p. 63.

³ [1915] 2 K.B. 321, 336.

⁴ [1941] 1 K.B. 424 (C.A.); see below, p. 237. Contrast *R. & A. Kohnstamm Ltd. v. Ludwig Krumm (London) Ltd.* [1940] 2 K.B. 359, which, it is submitted, must now be regarded as a questionable decision. In the *Kohnstamm* case the effect

company successfully resisted a claim by a Swedish Bank upon a pre-war agreement to pay a debt by instalments upon receiving assignments of corresponding parts of the Bank's claim against a German company, the grounds being that payment under the agreement would be a financial dealing for the benefit of the enemy and would operate to discharge an obligation of the enemy, though substituting therefor an obligation to the British company. From the decision of the Master of the Rolls in this case it is clear that the expression 'for the benefit of an enemy' in section 1 (2) of the Trading with the Enemy Act, 1939, is 'of the widest possible character' and is 'wide enough to sweep in any transaction of which it can be truly said (and this is a question of fact in each case) that it is for the benefit of an enemy'.

On the other hand, we have seen from an American decision¹ that benefit to the enemy is not an essential feature, and in 1915, when a person in this country obtained after the outbreak of war from enemy territory property belonging to him and in the hands of persons thereon, though no payment was due from him therefor, he was held by the Court of Criminal Appeal² to have been rightly convicted under a clause in a Proclamation (having statutory force), which forbade persons to obtain 'from the [German] Empire any goods...'. No doubt this would also be a common law misdemeanour. The mischief and the danger lie in the communication. But in the circumstances described at the end of subsection 2 of section 1 of the Trading with the Enemy Act, 1939, which practically covers all debts, the receipt of a sum of money from an enemy is not a statutory offence.³ There is little doubt that, apart from some such provision, the receipt of money from an enemy, since it involves the

of the transaction (which Macnaghten J. considered to be free from objection) was to discharge the obligation of an enemy debtor company to a British creditor by accepting payment from a British surety to the creditor and thereby creating an obligation upon the enemy debtor to reimburse the British surety. In the *Enskilda* case, the Court of Appeal declined to give effect to a transaction which would discharge the liability of an enemy debtor to a neutral company and substitute therefor a liability to a British company, 'a liability be it observed which that British company could not enforce during the war'. It is difficult to justify the *Kohnstamm* decision except by saying that as the assets of the enemy debtor company had been vested in the Custodian and it was being wound up, it was not in a position to benefit by being relieved of the obligation to its initial creditor. *Seligman v. Eagle Insurance Co.* [1917] 1 Ch. 519 is another case of a payment by an English surety of a debt due by an enemy to an English creditor, but there it was very much to the interest of the surety to make the payment.

¹ *The Rapid*, *supra*, p. 171.

² *R. v. Oppenheimer and Colbeck* [1915] 2 K.B. 755.

R. & A. Kohnstamm Ltd. v. Ludwig Krumm (London) Ltd. (*supra*).

dangers attendant upon intercourse already referred to,¹ would be unlawful.²

IN PRIZE³

'Trading with the Enemy' in the technical sense has nothing to do with the carriage of contraband, the breach of a blockade or the rendering of 'unneutral service'.⁴ These are acts which cannot be described as unlawful but are acts which international law permits a belligerent to prevent if he can and to punish by means of the machinery of his Prize Court, by condemnation of the property involved. The reason why forfeiture of the property involved is the appropriate penalty appears to be, in the words of the Court (presumably Lord Stowell) in *The Nelly*,⁵ 'that it is taken adhering to the enemy, and therefore the proprietor is *pro hac vice* to be considered as an enemy'. It is in fact enemy property.

From early times the Prize Court has enforced the prohibition against 'trading with the enemy' by condemning ships and cargoes involved therein. Lord Stowell in *The Hoop*⁶ gives many instances of condemnation from 1750 onwards. In *The Jonge Pieter*⁷ he applied the doctrine of continuous voyage, and condemned goods which were consigned from London to a neutral port 'with an ulterior purpose of sending them on to' an enemy port.

~ In view of the improbability of a continuance⁸ of the practice of granting licences to carry out ordinary trading transactions with the enemy it is unnecessary to examine the numerous decisions given before and during the period of the Napoleonic Wars. Hall⁹ gives a useful summary of some of the principal rules that were laid down,

¹ P. 173.

² Neville J. in *Seligman v. Eagle Insurance Co.* [1917] 1 Ch. 519, 525, touches this point but it is not clear what his opinion would have been in the absence of the permission of the Crown to receive money from the enemy.

³ See Colombos, *op. cit.*, to which I am much indebted.

⁴ One consequence of this distinction is illustrated by the opinion of the Privy Council in *The Panariellos* (1916) 32 T.L.R. 459, 462, namely, that a cargo involved in trading with the enemy does not cease to be confiscable because the actual *delictum* has come to an end.

⁵ (1800) 1 C. Rob. 219, n.

⁶ (1799) 1 C. Rob. 196, 198, and see Sir John Nicholl's argument in *Potts v. Bell*. For later cases see *The Cosmopolite* (No. 2) (1801) 4 C. Rob. 8.

⁷ (1801) 4 C. Rob. 79.

⁸ In the early part of the recent war it was necessary, for urgent industrial reasons, to grant a number of licences for the importation through neutral countries of small lots of enemy goods. Later there was a good deal of licensing of innocuous transactions with persons in unoccupied France.

⁹ *International Law*, § 196.

in the main, by the Prize Court. Lord Stowell's judgment in *The Hoop*¹ may be regarded as the leading exposition of the attitude of the Prize Court in the matter. Perhaps the most important decision in prize given upon this matter during the War of 1914 to 1918 is that of Sir Samuel Evans P., in *The Panariellos*,² in which he laid down certain general propositions which may be summarized as follows:

(i) upon the outbreak of war all intercourse, commercial or otherwise,³ with the enemy (*scilicet*, in the territorial sense) becomes illegal, unless licensed;

(ii) the prohibition applies equally to the subjects of allies;⁴

(iii) the property of the subjects of allies involved in such trading may be captured by any allied belligerent and condemned by his Prize Court;⁵

(iv) property may be condemned, whether the owner is acting with good faith or not.⁵

'Trading with the enemy', as the term implies, denotes an act which takes place during a war, and accordingly the Prize Court declined to regard as unlawful and contrary to public policy an ingenious transaction of barter—carried through before the war broke out—which had the effect of enabling a certain cargo *ex* a British ship to escape condemnation as enemy property.⁶ (That was the ground on which condemnation was sought—not trading with the enemy.) 'The common law of England', said Lord Merriman P.,⁷ 'and the legislation relating to trading with an enemy... forbids any form of commerce with the enemy, but, as the word implies, that assumes that the commerce is transacted after war has broken out.'

Old cases will be found in which a British subject, resident and trading in a neutral country, has been invested by our Courts with neutral character, and allowed to recover upon a claim involving

¹ *Supra*, p. 171.

² (1915) 31 T.L.R. 326; affirmed by the Privy Council (1916) 32 T.L.R. 459.

³ *Obiter*, on this point; see also *Robson v. Premier Oil and Pipe Line Co.* [1915] 2 Ch. 124, 136, adopted by Lord Dunedin in the *Ertel Bieber* case (1918) A.C. 260, 268.

⁴ In this respect following Lord Stowell in *The Nayade* (1802) 4 C. Rob. 251 and *The Neptunus* (1807) 6 Rob. 403. It has been held that it is not competent to one ally, acting alone, to license trade with the enemy so as to bind his allies. *The San Spiridione* (1856) 28 L.J. (O.S.) 204.

⁵ On this point see also *The Hoop* (*supra*). *The Madonna Delle Gracie* (1802) 4 C. Rob. 195 is a curious case of trading with the enemy for the purpose of supplying the British Navy with wine: property not condemned.

⁶ *The Glenearn* [1941] P. 51; see note in 58 L.Q.R. (1942), pp. 19-21. For another instance of a pre-war transaction, see *Wilson v. Ragsone & Co.* (1915) 31 T.L.R. 264.

⁷ At p. 61.

trading with a country at war with Great Britain;¹ but we should not recommend a British subject to-day to test the continued validity of these decisions by a personal experiment.

TRADING WITH THE ENEMY UNDER LICENCE

Up to and including the early years of the nineteenth century the orthodox view upon trading with the enemy was not nearly so severe as it is now,² and it was customary frequently to relax the general principle by granting to persons in this country and in the enemy country 'licences to trade', either general or special, which had the effect of legalizing *pro tanto* intercourse with the enemy and of making enforceable in English Courts contracts directly or collaterally involved in the process.³ The case law which grew up round this practice will be found in the text-books⁴ and need not detain us, as, so far as the Wars of 1914 to 1918 and 1939 to 1945 were concerned, the practice of granting licences for general trading purposes was not revived and the law is mainly of historical interest.

Licences to engage in trade which would otherwise involve the criminality and the nullity of the transaction may be granted (a) to or for the benefit of British subjects,⁵ (b) to enemy subjects, resident either in this country⁶ or in their own country⁷ or (c) to neutral

¹ *The Danous* (1802) 4 C. Rob. 255 (n.); *Bell v. Reid* (1813) 1 M. & S. 726.

² 'Thus in the year 1809 sixteen thousand licences were granted, and in the year 1811 eight thousand'—Butler and Maccoby, *Development of International Law*, p. 325. 'The particular mode in which [the consent of the Crown] may be expressed is not material. It may be signified in a variety of ways—by a licence granted to the individual for the special occasion, by an order in council, by proclamation, or under the authority of an act of parliament, to which the Crown is necessarily a party'—per Lord Stowell in *The Charlotta* (1814) 1 Dod. 387, 390.

³ Persons in neutral countries also sometimes received licences which protected them from the normal consequences of carriage of contraband or breach of blockade, but these were not licences to trade with the enemy in the strict sense. *The Rannveig* [1922] 1 A.C. 97 is a case in which a neutral shipowner unsuccessfully contended that his contraband trade with the enemy was by implication licensed by Great Britain; it turned upon the interpretation of the agreement alleged to confer such a licence, and it was not contended that such trade would not have been protected if the agreement had extended to it.

⁴ For instance, Halleck, *International Law* (3rd ed. 1893, by Sherston Baker), chap. xxx; Oppenheim, ii. p. 252 (n. i); *Usparicha v. Noble* (1811) 13 East 332, and comment in Pitt Cobbett, ii, p. 93; Hall, § 196. Numerous instances will be found in *English Prize Cases*, vols. i and ii, and in the *English and Empire Digest*, vol. 2; Aliens: Part IV.

⁵ *The Cousine Marianne* (1810) Edwards 346; *Flindt v. Scott* (1814) 5 Taunt. 674, where many cases upon licences are referred to.

⁶ *Usparicha v. Noble* (1811) 13 East 332.

⁷ *Kensington v. Inglis* (1807) 8 East 273, 290 (where Lord Ellenborough C.J. held that the enemy could not sue in his own name but that his British agent or

subjects.¹ Practice during the War of 1914 to 1918 shewed a number of exceptional instances of permitting intercourse with the enemy under licence from the appropriate Department of the Government,² and during the War of 1939 to 1945 the extension of the area of 'enemy territory' by occupation and the misfortunes of some thousands of British and allied nationals detained therein involved fairly extensive licensing of transactions which, though for their benefit, did not involve profit to the enemy either in foreign exchange or in goods. Moreover, it was the practice of the Trading with the Enemy Department to issue licences permitting actions to be instituted or carried on by or on behalf of enemies in the territorial sense subject to any objection that might be raised by defendants and to the order of the Court thereon.

(i) *Patents, trade marks and designs.* By a General Licence³ dated September 7, 1939, made in pursuance of section 1 of the Trading with the Enemy Act, 1939, and subsequently revoked, the Board of Trade permitted, upon certain conditions, (a) the payment on behalf of non-enemy persons of any fees necessary for obtaining the grant or renewal of patents, or for obtaining the registration of designs or trade marks in enemy territory, and (b) the payment on behalf of enemies of any fees necessary for the same purposes in any country not being enemy territory. This permission carried with it the right of communication with persons in enemy territory, through a neutral country and under the censorship of the British Patent Office.

(ii) *Life insurance policies.* The effect of war upon this contract will be discussed in chapter 13. All that need be said here is that during the War of 1939 to 1945 the Custodian of Enemy Property would on request accept payments of premiums due to enemy life insurance companies from policy-holders who wished to pay them. No licences were granted for the transmission of premiums to enemy countries upon pre-war contracts or for the making of new contracts during the war.

(iii) *Purchase of books.* During the earlier part of the War of 1914 to 1918 a number of booksellers in this country received licences to trustee could sue on his behalf). He expressed the opinion that 'the King's licence cannot, in point of law, have the effect of removing the personal disability of the [enemy] trader, in respect of suit, so as to enable him to sue in his own name'. *Sed quare.*

¹ *Anthony and Another v. Moline* (1814) 5 Taunt. 711.

² Scobell Armstrong, *War and Treaty Legislation, 1914-1922* (2nd ed. (1922)), contains much information on this subject.

³ S.R. & O. 1939, No. 1112. The Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland of 1947 (Cmd. 7022) contain provisions relating to Industrial, Literary and Artistic Property.

procure books published in enemy countries, and these licences were exercised by invoking the aid of a bookseller in a neutral country. Later this practice was modified and such books were obtained upon application to H.M. Stationery Office, which presumably procured them through our diplomatic or consular representatives in neutral countries. During the War of 1939 to 1945 until the invasion of Holland the Trading with the Enemy Branch in approved cases licensed English booksellers to procure books of a scientific or educational character from enemy countries. Thereafter the purchase of enemy books was much restricted, and the procedure was that H.M. Stationery Office bought them on request through safe channels in neutral countries, thus exercising a sort of censorship.

(iv) *Intercourse by solicitor and counsel.* The licensing of solicitors (and, apparently by implication, of counsel) acting on behalf of enemies is referred to later.¹

(v) *Release of cargoes.* Another instance of licensed transactions with the enemy occurred where, acting through the London Chamber of Commerce, British owners of cargo on vessels in non-enemy ports were permitted, in order to obtain possession of it, 'to pay freight and other necessary charges to or for the benefit of any enemy'.²

(vi) *Miscellaneous intercourse.* Circumstances arise in which a trader in this country may wish to communicate with an enemy correspondent, for instance, to ascertain whether goods shipped or commercial documents have reached their destination (information which may be of value in any post-war clearing of debts), or to learn whether the latter concurs in the view of the former that a particular contract between them has been dissolved by the outbreak of war, and the Trading with the Enemy Department had power to permit the necessary communication. Licences were also granted for the transmission of documents establishing or negating the title to property or of documents required in Probate proceedings.

An official notice issued in July 1940 stated the conditions upon which persons in this country were authorized to communicate upon personal matters with friends in enemy and enemy-occupied territory.

(vii) *During an armistice.* A long interval elapsed between the cessation of hostilities between Great Britain and Turkey in 1918 and the coming into effect of the Peace Treaty of Lausanne by its ratification in 1924. A shorter interval occurred between the cessation of hostilities with Bulgaria in 1918 and the coming into effect of the Peace Treaty

¹ P. 318.

² S.R. & O. 1939, No. 1695; and see S.R. & O. 1940, No. 1567.

of Neuilly on August 9, 1920. Nevertheless, doubtless in order that British traders might not suffer from the competition of commercial rivals not handicapped by a state of war, the Board of Trade issued a general licence to trade with those countries dated February 17, 1919, and trading took place thereunder.¹ There is little doubt that as a matter of law (apart from any exercise of power by the Crown under the Termination of the Present War (Definition) Act, 1918) a state of war with those countries continued until the respective peace treaties came into force.

(viii) *Collateral effects of licence.* Does a licence, general or special, merely protect the trader acting under it from a criminal prosecution, or does it do something more? We shall consider, first, the effect upon the contracts involved and, secondly, the right to sue.

(a) *Contracts.* It may be stated generally that the effect of the licence is to validate and render enforceable in English Courts both the contract directly authorized by it, for instance, a contract of sale, and any contract collateral or incidental thereto, for instance, affreightment and insurance.²

It is, however, difficult to see how it can *ipso facto* revive a contract upon which the effect of war has already operated and in regard to which the effect is dissolution. Suppose that *A* in London was at the time of the outbreak of war the agent of *B* in Berlin. The outbreak of war dissolved the agency. At a later stage *A* succeeds in persuading the Trading with the Enemy Branch that it is in the national interest that he should be licensed to act as *B*'s agent for a particular transaction or class of transactions. *A* may be the channel of importation into this country of a certain enemy product which we shall be glad to continue to receive until the enemy Government discovers the trade and stops it. *A* and *B* may thereupon create a new and valid contract of agency, either expressly or by implication, but the grant of the licence does not *ipso facto* revive the agency sundered by the outbreak of war. There is express authority in *Esposito v. Bowden*³ for the view that a contract once dissolved by the outbreak of war on the ground of illegality cannot be *ipso facto* reintegrated by a subsequent Order in Council permitting the otherwise illegal trading. There can be no doubt upon

¹ See Beckett in 39 *L.Q.R.* (1923), p. 89; Scobell Armstrong (*op. cit.*), Appendix X, prints a number of Post-Armistice Licences for the Resumption of Trade.

² *Usparicha v. Noble* (1811) 11 East 332 (the licensee was an enemy national resident in this country); *Morgan v. Oswald* (1812) 3 Taunt. 554.

³ (1855) 4 El. & Bl. 963, 975; (1857) 7 El. & Bl. 763, 778. See above, p. 97.

the legal principle involved, as has now been made clear by speeches in the House of Lords in the *Sovfracht* case.¹

The decision of the Court of Appeal in *Meyer v. Louis Dreyfus et Cie*² has given rise to misunderstanding and must be read in the light of the preceding paragraph. The question before the Court was whether, after the occupation of Paris by the Germans, service of a writ of summons upon one Gamburg, the London manager of a Paris firm carrying on business in England, was effective service upon the firm. Conditional appearance was entered on behalf of the four partners constituting the firm, and the action proceeded against the firm. Gamburg and his successors received a licence from the Trading with the Enemy Branch—its date and terms do not appear in the reports—to carry on the business of the then enemy firm on a basis of accountability to the Custodian, and the assets were treated as being held on the Custodian's account—not on the firm's account. There was no question, therefore, of any revival of Gamburg's previous agency for the firm and no evidence that he had ever sought to bring this about. The Court of Appeal held that as a result of the licence he was a 'person having at the time of service the control or management of the partnership business' in London, so that service upon him of a writ of summons satisfied the requirements of Order 48 A, rule 3, of the Rules of the Supreme Court, relating to service upon a partnership. That is not equivalent to saying that Gamburg, without any renewal of his agency after the occupation of Paris and the issue of the licence, had power to bind Louis Dreyfus et Cie by contracts made by him on their behalf. As MacKinnon L.J. said, the objection to the validity of the service was a 'pure technicality... If the defendants here had been an individual and not a firm, the service of the concurrent writ on Mr Gamburg would have been perfectly proper; and on the authority of *Porter v. Freudenberg*³ the initiation of these proceedings would have given to the plaintiff the right to come to the court...'. In that case the Court of Appeal intimated that, upon the materials before it, service of the notice of the writ should be effected by substituted service on the person who at the outbreak of war was the agent in England of the enemy defendant, but there is no suggestion that the agent still had power to bind his enemy principal by contract. MacKinnon L.J., by invoking the analogy of substituted service, seems to indicate that what matters is that the person served should be so circumstanced in regard to the enemy defendant that 'in all reasonable

¹ [1943] A.C. 203.

² [1940] 4 All E.R. 157; 67 Ll. L. Rep. 562; 163 L.T. 335. (The facts are not all clear to me.)

³ [1915] 1 K.B. 857 (C.A.).

probability, if not certainty' service upon him would 'be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant'.¹ The fact that Gamburg had been licensed to continue to manage the defendant's business contributed to the 'reasonable probability', if it did not create a 'certainty'. The Court of Appeal—whether rightly or wrongly does not matter for our purpose—considered that 'reasonable probability' existed and therefore upheld the service of the writ. It would be a profound mistake to draw from this decision the conclusion that the grant of the licence to Gamburg *ipso facto* reintegrated his pre-occupation authority to bind the Paris firm by contract or otherwise.²

(b) *The right to sue.* The person licensed, be he the grantee of a special licence or be he merely acting under a general licence, can certainly sue in connexion with the trading in an English Court, except that according to the decision of the Court of King's Bench in *Kensington v. Inglis*³ a licensee who is an enemy national, resident in his own country, cannot sue in his own name but only through a British agent or trustee. *Usparicha v. Noble*⁴ shews that a licensee who is an enemy national, resident in this country, may sue in his own name. The more difficult question is that of the right of the other party to the trading, the enemy (in the territorial sense) who is traded with, to sue in an English Court. We are not aware of any express decision upon this question in the affirmative or negative. There are many dicta to the effect, in the words of Lord Stowell in *The Hoop*, that 'the legality of commerce and the mutual use of courts of justice are inseparable', and Mr Beckett⁵ contends that, more particularly since the House of Lords laid it down by a majority in *Rodriguez v. Speyer*

¹ [1915] 1 K.B. at p. 889.

² In *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.; Theodor Schneider & Co. v. Burgett & Newsam* [1915] 2 K.B. 379, 383, 391. Scrutton J. had to consider the effect of a licence granted by the Board of Trade on September 25, 1914, to a British party to a contract of affreightment which was dissolved on August 4, 1914, on the ground that its performance involved intercourse with the enemy or that an enemy was a party to it or on both these grounds. He had no hesitation in holding that the licence authorized the British subject to perform with impunity the act specified in it, namely, to pay freight and charges to the agent of an enemy shipowner for the purpose of obtaining possession of his cargo, but that it in no way validated the dissolved contract, either prospectively or retrospectively. This view was affirmed expressly by two members of the Court of Appeal and, by implication, by the third ([1916] 1 K.B. 495, 508, 515). Warrington L.J. expressed the opinion (at p. 515) that the point had already been decided in *Eposito v. Bowden* (1857) 7 El. & Bl. 763.

³ (1807) 8 East 273.

⁴ (1811) 13 East 332. There is some discussion of the right to sue in *Public Trustee v. Davidson* [1925] S.C. 451 (Scottish).

⁵ 39 L.Q.R. (1923), pp. 89-97.

*Brothers*¹ that the plea of alien enemy is based upon a flexible rule of public policy which must give way when to allow an alien enemy to sue would not involve mischief from the point of view of public policy, the enemy traded with under licence should be allowed to sue in an English Court. The question is far from being one of purely academic interest. The occasion of Mr Beckett's examination of it was the position of Turkish residents with whom persons in this country were allowed to trade under a general licence issued by the Board of Trade in 1919, and we apprehend that the same question would arise if an English solicitor licensed to defend and receive instructions from a client who was an enemy in the territorial sense were negligent in the protection of his interests. We suggest that it would be repugnant to English justice that an enemy traded with under licence should have no recourse to an English Court during war for the enforcement of his contract.

Licences to enemies to bring suit are granted in certain cases by the Home Office.²

CUSTODIAN OF ENEMY PROPERTY

The Trading with the Enemy Act, 1939, the Defence (Trading with the Enemy) Regulations, 1940, and Orders made thereunder, also dealt with a matter which is wider than the offence of 'trading with the enemy'. Section 7 of the Act provides that:

'With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint' a Custodian of Enemy Property; may by order require the payment to him (*inter alia*) of money which would, but for the existence of a state of war,³ be payable to or for the benefit of an enemy; may vest in the Custodian such enemy property as may be prescribed and the right to transfer such other enemy property as may be prescribed; and may confer and impose upon the Custodian a multitude of rights, powers,⁴ duties and liabilities. Subsection 8 of section 7 of the Act defines 'enemy property' and 'property'.⁵

¹ See, however, above, pp. 44, 45.

² See note 1 on p. 189, and as to the enemy's solicitor, p. 318.

³ On this expression, see note 1 on p. 121, and S.R. & O. 1946, No. 1040.

⁴ The Custodian as such has no power to consent on behalf of an enemy party to a settlement to the exercise of a power of advancement, and it is at least doubtful whether the Board of Trade could confer that power upon him: *Re Forster's Settlement* [1942] Ch. 199.

⁵ Upon statutory protective trusts, see *In re Gourju's Will Trusts* [1943] Ch. 24, and *In re Wittke* [1944] Ch. 166. See also the Trading with the Enemy (Insolvency)

ADMINISTRATION

On September 3, 1939, the Treasury and the Board of Trade as the Departments charged with the administration of the Trading with the Enemy Act set up a joint Branch (Trading with the Enemy Branch¹) to act as a watchdog in matters of trading with the enemy, and in proper cases to issue licences or admonitions to banks, insurance companies, and traders generally. For convenience these functions were performed by the Patent Office in respect of patents, designs and trade marks, and matters involving the investigation and subsequent action upon the affairs of companies in the United Kingdom thought to be enemy-owned or possibly acting or capable of acting in enemy interests were dealt with by the Companies Department of the Board of Trade. A Notice to Traders was issued by the Board of Trade on the outbreak of war and widely distributed.

[Belonging to p. 69]

(o) *Suing by Royal licence.* The ancient disability of the alien enemy to sue can be removed for a particular case by the grant of a Royal licence, for which application is now made to the Home Office. Before applying to the Home Office for this licence it is desirable that the solicitor should first ascertain that he is in a position to accept a retainer from a client who is an alien enemy, and his application to the Trading with the Enemy Department for the grant of a licence to himself to accept the retainer should ordinarily precede his application to the Home Office for the grant of a Royal licence to his client to sue. That the distinction between these two licences has not always been realized is evident from the observations of Viscount Simon L.C. in the *Sovfracht* case [1943] A.C. at p. 208. By virtue of a Royal Warrant of April 1, 1944, a Royal licence to sue is issued to the alien enemy under the authority of a Secretary of State, usually the Home Secretary (in actions in Scottish courts, the Secretary of State for Scotland). The matter being one of unfettered executive discretion, it is not possible to lay down any specific rules which govern the grant or refusal of a licence. No doubt an application from a person who by reason of

Order, 1940, of August 4, 1940 (S.R. & O. 1940, No. 1419), which vested in the Custodian all debts and claims which would but for the existence of a state of war be provable by an 'enemy' (as defined by the Act as amended) in the winding up of a company or the bankruptcy or insolvency of an individual.

¹ Later called the Trading with the Enemy Department.

enemy occupation has become an enemy in the technical territorial sense will receive more favourable consideration than an application from an enemy in the strict sense of the word. Even so, it would seem that a licence to an alien enemy to commence proceedings in the courts of this country will be granted only rarely.¹ A judgment in the applicant's favour would in many cases confer a benefit on the enemy,² e.g. by enabling foreign exchange credit to be raised in a neutral country on the security of the contingent asset, and in such cases the application for a Royal licence will presumably be refused. Whilst these stringent conditions will apply as long as war is actually raging, it is clear that a more favourable view of such applications will be taken during the interval, sometimes long, between the 'cease fire' and the official end of the war with the particular enemy country. Indeed, official action has been taken to dispense with the necessity of a Royal licence in certain cases during the present waiting period. Soon after the cessation of hostilities the Government took steps to encourage trade with certain of the ex-enemy countries (still technically at war with His Majesty), and for this purpose the Board of Trade have from time to time made orders which are, in effect, general authorizations under paragraph (i) of the proviso to section 1 (2) of the Trading with the Enemy Act, 1939, permitting trade with these countries.³ It was thought, moreover, that enemy traders would not be encouraged to take advantage of this opportunity if they had to obtain a Royal licence to sue in the English courts upon any question which arose out of the subsequent trading. A regulation⁴ was therefore made providing that an alien enemy might, without a Royal licence, maintain legal proceedings arising out of any transaction entered into after the date of the regulation by virtue of such an authority. It will be noted that the regulation has no application to prize cases and that until the war completely ends by the conclusion of the treaties of peace or otherwise, an alien enemy will still require a Royal licence to commence proceedings in cases which do not fall within the limited terms of this regulation.

¹ See p. 66 above as to the issue of Royal licences to enemy claimants to appear in the Prize Court.

² *Sovfracht* case [1943] A.C. 203 at pp. 236, 252.

³ E.g. the Trading with the Enemy (Authorization) (Italy) Order, 1945, S.R. & O. 1945 (No. 1098) I, p. 1210. Orders have also been made authorizing trade with other countries.

⁴ Regulation 9 of the Defence (Trading with the Enemy) Regulations, 1940 (added to the Regulations by Article 2 of an Order in Council of December 7, 1945, S.R. & O. 1945 (No. 1534) II, p. 100).

CHAPTER 8

PARTICULAR CONTRACTS—AFFREIGHTMENT

(A) When Great Britain is a belligerent: (B) When Great Britain is a neutral.

A. WHEN GREAT BRITAIN IS A BELLIGERENT

We shall deal (1) with the effect of war in rendering contracts illegal, and (2) with their frustration by war.

I. ILLEGALITY

Scrutton L.J. has reminded us that¹ the offence of 'trading with the enemy was at first committed principally in relation to ships, their cargoes and the insurances thereon'.

Illegality can arise in two ways:

(a) when one party becomes an enemy in the territorial sense;²

(b) when, though neither party becomes an enemy in the territorial sense, the performance of the contract would involve intercourse with the enemy in that sense or with enemy or enemy-occupied territory.

Under the Trading with the Enemy Act, 1939 (subsection (2) of section 1), a person shall be deemed to have traded with the enemy '(a) if he has [*inter alia*] . . . carried, any goods consigned to or from an enemy or destined for or coming from enemy territory. . . '.

The contract may be embodied in a bill of lading, a time charter, or a voyage charter. The effect of the outbreak of war upon a pre-war contract is abrogation, dissolution, not suspension.

Proposition (a) was examined in *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.*, and *Theodor Schneider & Co. v. Burgett & Newsam*,³ cases of pre-war c.i.f. contracts between two pairs of firms who were all British or were treated as being British. The question before the

¹ In *Tingley v. Müller* [1917] 2 Ch. 144, 170.

² By reason of the outbreak of war or of the occupation of territory by the enemy or by transferring himself to enemy territory, see above, p. 86.

³ [1915] 2 K.B. 379; [1916] 1 K.B. 495 (C.A.). Of the four parties three are described as 'English firms', and the fourth, *Arnhold Karberg & Co.*, as 'a firm carrying on business in England'. Its exact composition is stated in *The Derfflinger* (No. 3) (1915) 1 British and Colonial Prize Cases 643. Scrutton J. treated them as a British firm for the purpose of the decision—[1915] 2 K.B. at p. 385. See also *Duncan, Fox & Co. v. Schrempf & Bonke* [1915] 1 K.B. 355 (both parties British firms).

Court was not one of the legality of the main contract, the c.i.f. contract, in each case, but of the effect upon the main contract of the consequence of the outbreak of war upon the ancillary contracts of insurance and affreightment, because the performance of a c.i.f. contract by the buyer requires the tender of valid and effective documents embodying these two ancillary contracts. In both cases the cargoes were shipped before the outbreak of war by German steamers which upon the outbreak entered neutral ports of refuge and remained there. In due course the seller tendered to the buyer the shipping documents which included two bills of lading embodying contracts with ship-owners who had become enemies in the territorial sense. It was held both by Scrutton J. and the Court of Appeal¹ that the buyer was entitled to refuse the tender, because the contracts of affreightment (and in one case the policy of insurance) had become void upon the outbreak of war. The judgment of the Court of Exchequer Chamber in *Esposito v. Bowden*,² delivered by Willes J., was cited and followed:

‘As to the mode of the operation of war upon contracts of affreightment, made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it.’

Esposito v. Bowden (British charterer and neutral shipowner) properly belongs to the class of case which we are next about to consider, but the effect, abrogation, is the same when the effect of the war is to make the two parties to the contract enemies to one another. In *Duncan, Fox & Co. v. Schrepff & Bonke*³ it was the British party who pleaded the effect of war. In *Barrick v. Buba*,⁴ an action brought by a British shipowner against a Russian merchant, it was the defendant, an enemy in the national and territorial senses, who was allowed to plead that the charter had been abrogated by the outbreak of the Crimean War, but whether he relied upon illegality by English or by Russian law does not appear. Even if neither party pleaded illegality arising from the outbreak of war, it would be the duty of the Court to take notice of it and give effect to it.⁵

¹ We need not consider here the difference of opinion between Scrutton J. and the Court of Appeal as to the real nature of a c.i.f. contract.

² (1857) 7 El. & Bl. 763, 783.

³ *Supra*.

⁴ (1857) 2 C.B. (N.S.) 563.

⁵ Atkin J. in *Duncan, Fox & Co. v. Schrepff and Bonke* [1915] 1 K.B. 365, 370. Contrast with this case *In re Weis & Co. and Crédit Colonial et Commercial (Antwerp)* [1916] 1 K.B. 346, a c.i.f. contract in which, delivery of the goods at the agreed port being impossible owing to risk of enemy action but not unlawful because the neutral port was not in enemy hands, the tender of the documents was valid.

(b) Circumstances occur in which, while neither party becomes an enemy in the territorial sense, the performance of the contract would involve intercourse with the enemy in that sense or with enemy or enemy-occupied territory.

In *Esposito v. Bowden*¹ (British charterer and neutral shipowner) it became illegal upon the outbreak of the Crimean War for the British charterer to load a cargo of grain at Odessa, and it was held by the Court of Exchequer Chamber that the contract was abrogated as from that moment. The ship had not arrived at Odessa when the war broke out. The result would be the same if the shipowner was British.² It is not necessary that it should become illegal for both parties to perform the contract. The further question arises—who may plead that the contract is discharged by illegality? Certainly a British party as in *Esposito v. Bowden*. We suggest also that a neutral party can plead that the contract is discharged because *qua* the British party, though not *qua* himself, performance has become illegal. *Barrick v. Buba*, already referred to, where an enemy defendant was allowed to plead illegality, gives some support to this view. Moreover, principle seems to point to the same conclusion, for when the illegality *qua* the British party arises, it does not give him an option either to perform the contract or not, either to plead illegality or not; he is absolutely prohibited from performance. The cause of dissolution does not lie in his hands; it operates by an external force. Nor can it be said against the neutral defendant that he is making use of his own wrong.

It might seem to be a praiseworthy act for a British shipowner or charterer to remove a cargo of grain from an enemy port; but, as Willes J. pointed out (at p. 789), 'the passing it through the custom house and obtaining a Russian permit for its shipment might have been but a slight case; still it would have been a case of dealing with the enemy'. (The remedy would be to obtain a licence from the British Crown.)

The question remains—what ought to happen if a British ship, or a neutral ship under charter to a British subject, had already been loaded when the war breaks out and is lying in an enemy port ready to sail? We suggest that if any port dues and export duty have already been paid and if the ship can get clearance without involving any inter-

¹ *Supra*.

² 7 El. & Bl. at p. 786. In *Reid v. Hoskins* and *Avery v. Bowden* (1856) 6 El. & Bl. 953 both parties were British. The main point argued in these cases was whether there had been a breach or a renunciation of the contract before it was dissolved by the outbreak of war. If a party to a contract acquires the right to treat the conduct of the other party as equivalent to a renunciation of the contract and omits so to treat it, he delays at his peril and can no longer so treat it when the contract has been dissolved by subsequently arising illegality.

course between the British shipowner or charterer or his agent and any enemy person, there is no obligation to unload the ship, but on the contrary she ought to sail, if she can, and it would be a breach of the charterparty (apart from any special exceptions clause) for her not to sail. So far as concerns a ship lying in a port of the enemy of her flag-State, it must be remembered that some States¹ follow the practice of granting days of grace during which enemy merchant ships may depart unmolested. It is hard to believe that a British shipowner or charterer who took advantage of these days of grace would be guilty of trading with the enemy and that the charterparty would thereby be dissolved; it is in fact the duty of a British ship to escape from the enemy port at once.²

On the other hand, if upon the outbreak of war a British shipowner or charterer has already loaded a ship at a non-enemy port for an enemy destination, then—in the opinion of Lord Tenterden³—

‘the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage, although a different rule is laid down in this case by the French ordinance, . . .’

Lord Tenterden’s observations relate to the case of a ship bound for an enemy destination, and we do not think they are relevant to the case of a ship due to sail from an enemy destination.

We have dealt with the following cases: (i) British cargo-owner and enemy shipowner (*Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.*); (ii) British charterer, neutral shipowner, enemy port of loading (*Esposito v. Bowden*); (iii) British shipowner and British cargo-owner, enemy port of loading (*Reid v. Hoskins*; *Avery v. Bowden*); (iv) British shipowner and enemy cargo-owner, enemy port of loading (*Barrick v. Buba*). So also (v) a charterparty between a British cargo-owner and a foreign non-enemy but belligerent shipowner, the port of loading being within the territory of the latter’s enemy, is dissolved by the outbreak of war.⁴ There still remain the case where the outbreak of war does not make performance illegal but results in (vi) the shipowner becoming the subject of a belligerent State, so that the ship may become the legitimate object of attack by the opposite belligerent

¹ Including for a period Great Britain; see Oppenheim, ii, § 102*a*.

² 7 El. & Bl. at p. 786.

³ Abbott’s *Law of Merchant Ships and Seamen* (14th ed. 1901), p. 867, where it is pointed out that Lord Tenterden’s opinion is fortified by *Avery v. Bowden* (*supra*).

⁴ 7 El. & Bl. at p. 791.

as private enemy property on the high seas. It is suggested that the character and the *termini* of the voyage may be such that the continuance of the non-belligerent status of the ship is a condition precedent of the charterparty, e.g. that she carries a non-belligerent flag, and that the change of her status from pacific to belligerent may fundamentally change the character of the voyage and dissolve the charterparty on the ground that to enforce it would impose a new contract upon the parties.¹ What is a fundamental change? The decisions upon seamen's employment to be discussed later² give little help. There is a relativity in these matters, and the extension of sea warfare to two new dimensions by means of the submarine and the air-bomber has greatly increased the danger to which merchant ships carrying the flag of a belligerent are exposed. We submit that, in the case of a pre-war contract of affreightment relating to a British ship, each case must be considered on its merits; while the outbreak of war would not *ipso facto* dissolve the contract, the voyage might be such that its peaceful character was fundamentally changed and the contract dissolved. Contrast, in September 1939, the voyage of a British ship from Newcastle-on-Tyne to Gothenburg and the coasting voyage of a British ship between two Australian ports.

'King's enemies' as an excepted peril. Apart, however, from dissolution of the contract, the question arises whether default by the shipowner resulting from enemy action renders him liable or not. A common carrier is protected by the common law from loss or damage resulting from the act of the 'King's enemies'. We shall not discuss the questions whether and, if so, in what circumstances, a shipowner can be a common carrier, because charterparties and bills of lading commonly include the 'King's enemies'³ amongst the excepted perils, and the Carriage of Goods by Sea Act, 1924, Rule 2 of Article IV of the Schedule, enumerates 'Act of War' and 'Act of Public Enemies' amongst the statutory exceptions from liability.

Suspension clause. In discussing the *Ertel Bieber* case⁴ we noticed the view formed by the House of Lords upon the effect of a suspension clause in a long-term contract for the supply of goods. The same principle has been applied to a suspension clause in a time charter. In *Clapham Steamship Co. v. Handels-en-Transport Maatschappij Vulcaan of Rotterdam*,⁵ a British ship was let in 1913 on a time charter for five

¹ *Behn v. Burness* (1863) 3 B. & S. 751, 757, cited in Scrutton, *Charterparties and Bills of Lading* (14th ed. 1939, W. L. McNair and Mocatta) Art. 26 and *Hoyland v. Ralli*, *loc. cit.* note (h).

² Pp. 228-232.

³ Scrutton L.J. was of the opinion that probably this means only the enemies of the sovereign of the shipowner, *op. cit.* Article 81; and see *Russell v. Niemann* (1864) 17 C.B. (N.S.) 163.

⁴ Above, p. 94.

⁵ [1917] 2 K.B. 639.

years to a Dutch company so closely associated with the enemy that the effect of the charter was 'to oblige British subjects to render service for the benefit of enemies'. A clause provided that in the event of such a war as broke out in August 1914 'charterers and/or owners shall have the option of suspending this charter for the time during which hostilities are in progress'. The shipowners brought an action for a declaration that the charter, 'as being a contract with or on behalf of alien enemies, and as involving, if kept alive, an unlawful contractual relationship and trading with alien enemies', was dissolved on the outbreak of war. Both on the principle of *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*,¹ and on the strength of the suspension clause in the charter, it was argued by the charterers that they were entitled to the use of the steamship after the war. This contention was, however, rejected, Rowlatt J. pointing out that the effect of maintaining the charter in a state of suspension secured shipping facilities to the enemy upon the conclusion of peace and thus fortified his commercial position during the war, while hampering the British shipowner in the disposal of his tonnage. These grounds were enough to avoid the contract *in toto*, and whether the fact that a contrary decision would benefit the enemy after the war as well as during its continuance also had the same vitiating effect upon the contract the learned judge did not consider it necessary to decide. We now know from the *Ertel Bieber* case² that it would.

'I do not base my decision [said Rowlatt J.]³ on the ground that the maintenance of the charterparty in a state of suspension during the war will benefit the enemy after the war. That may or may not of itself make it illegal. What I say is that it supports the enemy during the war.'

The ground of this conclusion is that

'if at the moment when war breaks out the enemy is entitled to retain his assurance of tonnage to be available at the end of the war his commercial position is fortified even during the war. He is enabled, by the prospect of shipping facilities which he has, to keep together his connection with neutral or enemy merchants overseas, and even (if he likes to speculate on the war being short or if he can obtain contracts with conditions protecting him if it should be long) to enter *de prae-senti* into new contracts to be performed when peace arrives.'⁴

Incidentally, this passage is also valuable in that it points out clearly the reason why, at any rate in the case of a pre-war commercial contract

¹ [1916] 2 A.C. 397.

³ [1917] 2 K.B. at p. 646.

² [1918] A.C. 260.

⁴ [1917] 2 K.B. at p. 645.

which benefits the enemy, we must expect to find its fate to be abrogation and not merely suspension.

Recovery of freight. When a party to a contract is unable to perform it because it has become illegal to do so, he is unable to recover the reward which would have been due to him if he had performed the contract. So a British shipowner who has undertaken by a pre-war bill of lading to carry a cargo to a port, Hamburg, which upon the outbreak of war becomes an enemy port, may retain any advance freight¹ but is not entitled to recover other freight; nor in the absence of provision to the contrary in the bill of lading or of a new agreement will he be entitled to freight *pro rata itineris* for carrying it to a reasonable non-enemy port, Runcorn.² 'If a contract once made becomes legally impossible of performance, then in the absence of new agreement the parties remain in the circumstances in which they find themselves.'³

2. FRUSTRATION

It is from the charterparty cases that the doctrine of frustration of the adventure arises and nowhere is the conception of an 'adventure' more appropriate. Consequently, we have already had occasion to examine a number of decisions upon charters in chapter 6 in tracing the history of the doctrine and examining the theory which underlies it.⁴ We must refer the reader to these earlier pages and have little to add to them.

Lord Sumner said in the *Bank Line* case:⁵ 'The principle of frustration was originally decided on a voyage charter', doubtless referring to *Geipel v. Smith*⁶ and *Jackson v. Union Marine Insurance Co.*,⁷ and it was so applied in a number of cases before⁸ and during the War of 1914 to 1918. A charter for a single voyage lends itself more easily to the notion of an 'adventure' than a charter for a period of time, and it was with some difficulty that the doctrine was applied to time charters. In *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*⁹ there was a conflict of opinion in the House of Lords on this

¹ By a peculiar rule of the law merchant which is preserved in the Law Reform (Frustrated Contracts) Act, 1943.

² *St Enoch Shipping Co. v. Phosphate Mining Co.* [1916] 2 K.B. 624.

³ *Ibid.* per Rowlatt J. at p. 628.

⁴ For a valuable summary of the application of the doctrine to charterparties, see Scrutton, *op. cit.* Article 30; and see Carver, *Carriage by Sea* (8th ed. 1938), §§ 232-234. See Law Reform (Frustrated Contracts) Act, 1943, in Appendix II, p. 411.

⁵ *Bank Line v. Arthur Capel & Co.* [1919] A.C. at p. 452.

⁶ Above, p. 140.

⁷ Above, p. 140.

⁸ *Embiricos v. Reid* [1914] 3 K.B. 45 (war between Greece and Turkey in 1912).

⁹ [1916] 2 A.C. 397.

point, and in fact the doctrine was not applied to the time charter under consideration. In *Scottish Navigation Co. v. W. A. Souter & Co.*¹ and *Admiral Shipping Co. v. Weidner, Hopkins & Co.*¹ the charters entered into before the war ('one Baltic round' in the former and 'two Baltic rounds' in the latter) were ambiguous in character and were both held by the Court of Appeal to have been frustrated when the two ships were detained in Russian ports upon the outbreak of war between Germany and Russia and there remained up to the date of the trial. But in the *Bank Line* case² we get a clear decision from the House of Lords applying the doctrine to a time charter entered into after the outbreak of war which was frustrated upon requisition by the British Government. Lord Sumner's speech is of particular value. He adopts from Lord Dunedin³ one of the best definitions of the circumstances which cause the doctrine to apply: 'an interruption...so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted'. Other instances of a time charter to which the doctrine was applied are to be found in the *Hirji Mulji* case⁴ and in *W. J. Tatem, Ltd. v. Gamboa*,⁵ which we have already discussed from a wider point of view.

In *Associated Portland Cement Manufacturers v. William Cory and Son*⁶ Rowlatt J. had to consider the effect of dislocating circumstances produced by war upon a pre-war contract for the carriage of cement from the Thames to the Forth during a period of six years at agreed rates of freight. (It is unnecessary to deal with the argument based upon the exceptions clause, and, in particular, 'restraint of princes'.) The shipowner, having refused to carry at the agreed rates, while willing to carry at a higher rate, was sued for damages for breach of contract and pleaded *inter alia* that the contract had been frustrated. Among the circumstances alleged to have produced this result were the following: Government requisitioning of a considerable portion of the shipowner's fleet; interruption with the shipowner's regular return trade in carrying to London coal from Forth ports which had been closed owing to the war; numerous restrictions upon navigation causing excessive delay. Rowlatt J. declined to hold that the contract had been frustrated either on the plea that the parties had contracted

¹ [1917] 1 K.B. 222.

² *Supra*.

³ *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A.C. at p. 128.

⁴ [1926] A.C. 497.

⁵ [1939] 1 K.B. 132. See also *Bank v. Bromley & Son* (1920) 37 T.L.R. 71, discussed above, p. 156, n. 3.

⁶ (1915) 31 T.L.R. 442. See also *Bolckow, Vaughan & Co. v. Compania Minera de Sierra Minera*, below, p. 310.

on the basis of the continuance of peace or on the plea that 'the return coal trade lay at the root of the contract'. On the other hand, the same learned judge in *Pacific Phosphate Co. v. Empire Transport Co.*¹ was faced with circumstances in which he applied the doctrine of frustration. A contract was made in August 1913, whereby the shipowners agreed to supply to the charterers twelve steamers of a certain class in each of the years 1914 to 1918 inclusive to load phosphate from the Pacific to Europe. It contained the following clause:

'In the event of circumstances beyond the control of the charterers relieving the buyers for whom the shipments were intended from their obligation to take delivery, the charterers may give three months' notice to the shipowners to suspend shipments during the continuance of such circumstances, and any period during which this contract remains so suspended shall be added on to the end of the contract period. In the event of a war in which Great Britain is engaged and which is likely to affect the safety of the steamers or their cargoes, shipments may at the option of either party be suspended until the termination of the war, and the period of such suspension shall be added on to the end of the contract period.'

But he held that the War of 1914 to 1918 and its dislocating consequences transcended in magnitude and character what the parties had contemplated.

'The parties had contemplated a state of affairs in which there would be some risk but they never contemplated such a war as actually happened or its consequences. The whole shipping industry had been dislocated; the Government had taken control and shipowners were *de facto* not free. Increase in cost was not in itself a cause of frustration, but it could be looked on as an indication of the change in conditions generally.'

Here the change was so great that the doctrine of frustration applied, and the charterers were not entitled to a declaration that the contract of August 1913 was still valid and subsisting. Rowlatt J.'s test of frustration is that 'the change in circumstances must be so great that no reasonable man would have entered into the contract in the new circumstances'.

*Larrinaga & Co. v. Société Franco-Américaine des Phosphates de Medulla*² requires notice for Viscount Finlay's statement of the theory of frustration in which he refers both to the basis of the continued existence of a certain statement of facts and to an implied condition, and for Lord Sumner's remark³ that 'if a contract is really a speculative one, as this

¹ (1920) 36 T.L.R. 750.

² (1923) 29 Com. Cas. 1.

³ At p. 18.

plainly is, the doctrine of frustration can rarely, if ever, apply to it; presumably its speculative character negatives any presumption of the parties' implied agreement to terminate the contract in the event of some unforeseen event on its consequences. But it is also important upon the bearing of the doctrine of frustration upon a charter involving six successive shipments of six substantially identical cargoes between the same ports at the same rate of freight. The parties agreed to waive their rights as regards the first three shipments, which would have taken place during the War of 1914 to 1918, and when towards the end of the war the charterers intimated to the shipowners that they would expect them to carry out the remaining three shipments as soon as the war was over, the latter pleaded that the contract had been discharged by frustration. It was, however, held upon the construction of the charter that it provided for distinct and separate, though almost identical, commercial adventures, and that the mere fact that the parties had agreed to waive the first three did not amount to a frustration of the contract. There was no question of illegality or of prohibition by legal authority.

Bills of lading. In a footnote in Scrutton's *Charterparties and Bills of Lading*¹ it is said that 'for obvious reasons the question [discharge of contract by delay] can rarely arise on a bill of lading'.

Abandonment of the venture. It is perhaps worth mentioning, in order to distinguish it from frustration, the abandonment of a maritime venture by the party in a position to do so, namely, the shipowner being (normally) the person in control of the ship and, by consequence, of the cargo. The case may arise in which the master, who is the shipowner's agent for this purpose, may decide that owing to pressure of circumstances, for instance, stress of weather, the agreed voyage cannot be completed and must be abandoned. It is abandoned—voluntarily and without hope or intention of resuming it—and the owner of the cargo is notified by the shipowner or the master. Later the cargo comes into the possession of its owner, and the question arises whether the stipulated freight or any part of it is due. The decisions²

¹ 14th ed. p. 112 (i). *Dinham, Fawcus & Co. v. Witherington and Everett* [1916] W.N. 154 shows that the distinction between specific and unascertained goods finds something approaching a parallel in the case of a charterparty in the distinction between a charterparty for a specific ship and one which is in fact a contract to supply tonnage; in the latter case the requisition by the Government of the shipowner's only two remaining ships of the kind contracted for will not excuse him as a 'restraint of princes', and he must go into the market and procure one.

² *The Kathleen* (1874) L.R. 4 A. & E. 269; *The Cito* (1881) 7 P.D. 5; *The Arno* (1895) 72 L.T. 621.

apply a general principle of the law of contract, namely that 'if one party to a contract repudiates it and declines to perform it, the other party may accept the repudiation',¹ and the contract is at an end, so that no freight is due. Abandonment usually occurs as the result of extreme stress of weather, and the vessel then becomes derelict. During the War of 1914 to 1918 the question arose, in *Bradley v. H. Newsom, Sons & Co.*,² of the effect of an abandonment following enemy action. A ship, apparently British, was attacked while on a voyage from Archangel to Hull by an enemy submarine, and the master and crew were ordered to abandon her. They did so and believed (erroneously as it turned out) that she was later sunk by the submarine. In fact she was towed into a British port in a waterlogged condition by naval patrols. After much conflict in the Courts below the House of Lords held (*dissentiente*, however, Lord Sumner) that the cargo-owner was not entitled to the cargo free of freight (by arrangement and without prejudice the shipowner had completed the voyage and delivered the cargo), because there had been no abandonment. The master and crew had not '*abandoned* her without any intention of returning to her, and without hope of recovery'. They '*simply yielded to force*. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine.'³

We do not think that this decision means that in no circumstances can there be a voluntary abandonment of a ship so as to constitute her a derelict when the cause of the abandonment is enemy action. It is conceivable that a timorous neutral master, on learning that his ship was about to enter a zone infested by submarines and bombers, might be unwilling to risk the lives of himself and his crew and might elect to abandon a ship, and we see no reason why his abandonment should not be voluntary and *sine animo revertendi vel spe recuperandi*, so as to amount to a renunciation of the contract.

B. WHEN GREAT BRITAIN IS A NEUTRAL

In a war to which Great Britain is not a party different questions arise. We can treat the matter under two headings.

(i) *When the carriage of contraband, the breach of blockade or the rendering of other unneutral service is not involved.* A British subject who has

¹ Per Bankes L.J. in *H. Newsom, Sons & Co. v. Bradley* [1918] 1 K.B. 271, 277.

² [1919] A.C. 16.

³ Per Lord Finlay L.C. at p. 27. See also *The San Dimitrio* and *The Albion* [1942] P. 81.

entered into a contract of affreightment with a person whose country is, or becomes, a belligerent, may find that his contractual rights are affected by the fact of war. Just as it is illegal for a British subject or person resident or carrying on business in this country to have intercourse with Great Britain's enemy, so it is usually *ipso facto* illegal, or made illegal by legislation, for the nationals of most other countries to have intercourse with their country's enemies. In *Esposito v. Bowden* it was lawful for the neutral Neapolitan shipowner to load a cargo at Odessa on his ship but unlawful for the British charterer to do so, and therefore the contract was discharged. But, as Willes J. said:¹ 'this is not an unequal law, because, if war had broken out between the Czar and the King of the Two Sicilies, instead of Her Majesty, the vessel would, according to the principles stated above, have been absolved from going to Odessa, and might forthwith have proceeded upon another voyage'. A British charterer cannot compel a foreign shipowner to engage in illegal trade with the latter's enemy.

But when no question of illegality arises²—when neither the owner of the ship nor the owner of the cargo becomes the subject of a belligerent State, when neither the port of loading nor the port of destination is in the territory of a belligerent State—what effect, if any, does its outbreak apart from special provision have upon the contract of affreightment? War undoubtedly aggravates the perils of maritime transport to an increasing extent, as insurance rates bear witness; but it is submitted that, apart from special provision in the contract, the mere outbreak of war will not affect the contractual obligations. The outbreak of the present war has made employment in London, Liverpool and many other places more dangerous than it was in 1938, but that fact cannot be said to affect the obligations of a pre-war contract of employment in such a place. The observations of Lord Campbell C.J. in *Avery v. Bowden*³ upon the effect of a war between Russia and Turkey point *a fortiori* to this conclusion, as does the following remark by Lord Tenterden:⁴

'But if war or hostilities break out between the place, to which the ship or cargo belongs, and any other nation, to which they are not

¹ 7 El. & Bl. at p. 791. See *Furness, Withy & Co. v. Rederieaktiebolaget (sic) Banco* [1917] 2 K.B. 873.

² For a case in which the charter provided for different rates of hire in the case of trading to neutral and to belligerent ports respectively see *Halcyon Steamship Co. v. Continental Grain Co.* [1943] 1 K.B. 355.

³ (1855) 5 El. & Bl. 714, 724, 725.

⁴ Abbott's *Law of Shipping and Merchant Seamen* (14th ed.), p. 867. It is fair to say that sea warfare is a much more ruthless and indiscriminate affair than it was, say, at the time of the Crimean War.

destined: although the performance of the contract is thereby rendered more hazardous, yet is not the contract itself dissolved, and each of the parties must submit to the extraordinary peril, unless they mutually agree to abandon the adventure.'

Surely in the case of a war to which neither the State of the ship-owner or of the cargo-owner becomes a party, this statement is even more true. It cannot be said that there has been a fundamental change in the character of the contract, such as occurs when the outbreak of war converts a peaceful voyage into a blockade-running trip. On the other hand, if it is shewn that one of the belligerents, whether after declaring a particular area to be a war zone or not, is sinking, at sight and regardless of the flag and the character of the voyage, all ships proceeding upon the agreed voyage, then it might be maintained that the character of the voyage has been changed and the contract dissolved.

(ii) *When performance of the contract involves carriage of contraband, breach of blockade, or the rendering of other unneutral service.* Our municipal law does not treat the carriage of contraband or blockade-running or other unneutral service as illegal,¹ and our Government recognizes the right of belligerents to check these practices by the infliction of the customary penalties. When therefore a contract for such a purpose is entered into either before or during the war, then, at any rate where the party against whom it is sought to enforce it knew or ought to have known of the peculiar nature of the venture,² the law will enforce it.³ But where the contract is made, for instance, before and not in contemplation of war, or before and not in contemplation of the blockade of the agreed destination, it is believed that the contract must be treated as discharged on the ground that a totally new state of affairs has arisen, and the contract has ceased to involve an ordinary commercial adventure.

Some countenance is lent to this view by the case of *The Teutonia*,⁴ although the ship was Prussian and Prussia became a belligerent, so that it is not a simple case of a neutral ship bound for a blockaded port. There a British merchant had shipped goods at a South American port on board a Prussian vessel to be discharged at any port in Great Britain or on the Continent between Havre and Hamburg, and the cargo-

¹ See above, chapter I.

² See *Palace Shipping Co. v. Caine* [1907] A.C. 386, and other cases cited below at pp. 229-232 upon Employment.

³ See *Carver's Carriage by Sea* (8th ed.), §§ 245-246.

⁴ (1871) L.R. 3 A. & E. 394; (1872) L.R. 4 P.C. 171.

owner had ordered the goods to be delivered at Dunkirk. The ship arrived off Dunkirk on July 16, 1870 and lay to about fourteen miles away, the master having heard rumours of war between Prussia and France. Presently a regular pilot, in official uniform, came aboard and told the master that war had been declared two days ago. Accordingly the master took his ship over to the Downs, and on the 19th took her into Dover. As a matter of fact, a state of war did not begin until the 19th, so that the master could have entered Dunkirk on the 16th without committing what for him would be the offence of trading with the enemy. The master then demanded freight before releasing his cargo at Dover. The Privy Council, affirming the decision of the Court of Admiralty (Sir Robert Phillimore), held that the master was justified in making further inquiries before entering Dunkirk and that the British cargo-owner could not complain of his taking reasonable and prudent steps for the preservation of his ship; also, that since the charterparty had originally contemplated delivery at Dover as possible and had named a freight for that port, the master was entitled to his freight before releasing the cargo.

Geipel v. Smith,¹ where a British ship² was under a pre-war charter to carry coal to Hamburg when the Franco-Prussian War broke out and that port was blockaded by the French, shews that the outbreak of war by converting what was purely a commercial venture into an attempt to run a blockade discharges both shipowner and charterer from performance. The fact that, as the Court held, a blockade came within the 'restraint of princes' clause in the charterparty would have been enough to protect the shipowner from an action for damages for refusing to attempt to run the blockade or even send his ship to the loading port, but for the reasons discussed above in Chapter 6 the drastic change in the character of the voyage produced by the blockade dissolved the contract entirely.

The effect of the decisions upon a seaman's contract of service about to be discussed³ also points in the same direction.

¹ (1872) L.R. 7 Q.B. 404.

² The nationality of the charterer is not stated.

³ Pp. 239-232. In *Crawford & Rowat v. Wilson, Sons & Co.* (1896) 1 Com. Cas. 154 and 277 the expression 'unavoidable accident or hindrance in discharging the cargo' protected the charterer from a claim for demurrage, when a rebellion at the port of discharge dislocated arrangements for unloading.

CHAPTER 9

AGENCY

A. BY COMMON LAW

(i) *As between principal and agent.* If we look at the matter from the point of view of principle, agency is certainly a contract which we should expect to be abrogated by reason of the prohibition of intercourse with enemies in the territorial sense, and moreover incapable of being created during the war. Leaving on one side for the present the American cases, we find that in *Tingley v. Müller*¹ (which we shall discuss later) Lord Cozens-Hardy M.R. said: 'it is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended.' (The suspension theory was then at its last gasp.) And in *Hugh Stevenson & Sons, Ltd. v. Actiengesellschaft für Cartonnagen-Industrie*² (a partnership case) it was held by Atkin J. and by the Court of Appeal that both the partnership and the contract of agency between the partners were *ipso facto* abrogated by the outbreak of war which made one of them an enemy in the territorial sense. In the words of Swinfen Eady L.J.:³ 'the contract of agency was terminated by the war. It was a trading contract, and war dissolves all contracts which involve trading with the enemy.' There was little serious controversy on this point, the real question being, What happens to the enemy partner's share of the assets? But although the contract of agency is abrogated, rights of action already accrued and rights which are 'the concomitant of rights of property' are preserved. There can be no doubt that an agent must account to his principal after the war for the principal's property in his possession or for money due to the principal. This decision also makes it probable that, if he made use of the principal's property during the war, he would be made to account to his principal after the war for the profits he has made. As Lord Atkinson said in this decision: 'This is not a case of mere debtor and creditor. It is a case . . . between a principal and an agent who has got possession of his principal's property and traded with it for profit.'⁴

We have already⁵ discussed the effect of the grant by the Crown of a

¹ [1917] 2 Ch. 144, 156.

³ [1917] 1 K.B. at p. 845.

⁴ At p. 256.

² [1917] 1 K.B. 842; [1918] A.C. 239.

⁵ Above, p. 186.

licence to an agent in this country of an enemy principal to continue his agency, and have submitted the view that we are not constrained by the decision of the Court of Appeal in *Meyer v. Louis Dreyfus et Cie.*¹ to hold that the grant of a licence renews an agency interrupted by the outbreak of war (or the enemy occupation of the territory in which the principal is located) *ipso facto* and without fresh authority from the principal. The speeches of Lord Wright and Lord Porter in *V/O Sovfracht v. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*² contain some authority for the view, upon which there can be no doubt, that the receipt by an agent of a licence to act for his enemy principal does not revive the agency abrogated by the outbreak of war.

(ii) *As regards third parties.* If the agency is abrogated as between principal and agent by the outbreak of war, the agent has no longer power to bind his principal, for the agent derives his power from the principal. In *Maxwell v. Grunhut*³ the agent in this country of an enemy in both the national and the territorial senses brought an action against his principal in which he sought a declaration that he was entitled to collect debts due to his principal and pay debts due from his principal in pursuance of a power of attorney granted to him by his principal upon the eve of the outbreak of war. The declaration was refused to him by a full Court of Appeal, partly because the action was misconceived, but also because 'the agent could have no greater right than his principal who, being an alien enemy, could not sue'. (He also applied for the appointment of a receiver of the assets of the business, but the Court took the view that there was no jurisdiction to appoint one. This decision and *In re Gaudig and Blum*,⁴ which followed it, illustrated the necessity of the institution of a Custodian of Enemy Property. But there were several cases of receivers being appointed in the case of partnerships dissolved by the outbreak of war in 1914.)

Not only has the agent in this country no power to sue on behalf of a principal who is in the enemy country, but (apart from the criminal aspect) he has no power to contract for or bind his principal in other respects, for he derives his power from his principal. Both civilly

¹ [1940] 4 All E.R. 157; 67 Ll. L. Rep. 562. See also below, p. 312 (Solicitor's retainer).

² [1943] A.C. 203.

³ (1914) 31 T.L.R. 79. It is lamentable that a decision of a full Court of Appeal should only have been reported in 31 T.L.R. 79 and 59 Sol. Jo. 104. See also *Brandon v. Nesbitt* (1794) 6 T.R. 23, with which *Maxwell v. Grunhut* is in accord. Baty and Morgan (p. 273) explain *Flindt v. Waters* (1812) 15 East 260 by pointing out that there the defendants 'had failed to plead specially the defence of alien enemy' as was then required.

⁴ (1915) 31 T.L.R. 153.

and criminally, the interposition of an agent cannot cure what is in effect a transaction with the enemy.¹

English law therefore rejects the lax view expressed in the Supreme Judicial Court of Massachusetts in 1868 in *Kershaw v. Kelsey*² where Gray J. said:

'When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war [italics ours], payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money.'³

The American decisions are more indulgent than ours to the agent or trustee suing in his own country on behalf of a principal in the enemy country. It is not proposed to discuss them because the opinion of the full Court of Appeal in *Maxwell v. Grunhut*, referred to above, shews that our law has adopted the stricter, and, we suggest, the more logical view. References to and an examination of these decisions will be found in Hyde, *International Law*,⁴ Moore, *Digest of International Law*,⁵ and Baty and Morgan, *War: Its Conduct and Legal Results*.⁶ Many of these decisions arose from the Civil War, and, as has been pointed out by Bentwich (cited by Baty and Morgan), such decisions are not always a reliable guide when international war is in question.

Irrevocable power of sale. There is, however, one kind of agency which may almost be called a 'concomitant of the rights of property' and requires special consideration. In *Tingley v. Müller*,⁷ the facts in

¹ For the position of the proxy in this country of an enemy shareholder, see below, p. 222.

² 100 Mass. 561; 97 Am. Dec. 124; 1 Am. Rep. 142; Hudson, *Cases on International Law* (2nd ed.), p. 1301; Pitt Cobbett, ii, p. 90.

³ In *Schmitz v. Van der Veen & Co.* (1915) 84 L.J. K.B. 861, the plaintiff, the correspondent in England of an enemy, was allowed by Rowlatt J. to recover the price of goods sold and delivered on the ground that he sold as a principal, though under a duty to account to the enemy for a percentage of the excess over a minimum price. The learned judge was of the opinion that the sale in England was between two principals; the plaintiff had in fact consented to the sum due from him to the enemy being vested in the Public Trustee. This decision may have to be re-considered in the light of the *Sovfracht* case: see above, p. 49.

⁴ Vol. ii, § 609.

⁵ §§ 1136, 1137.

⁶ Pp. 272-276.

⁷ [1917] 2 Ch. 144 (C.A.). Moore, *Digest of International Law*, § 1137, cites three American decisions pointing in the same direction; and see Hyde, ii, § 609. It is clear from the speeches of Lord Wright and Lord Porter in the *Sovfracht* case (1943) A.C. at pp. 236 and 255 that *Tingley v. Müller* will have a rough passage when it comes directly before the House of Lords.

which have already been stated,¹ five out of six members of a full Court of Appeal held that an irrevocable power of attorney to sell land in England granted in England by an enemy national was not revoked by his departure from England and arrival in Germany before the date of the sale. The grounds of the five majority judgments are not entirely uniform. The main ground is the special character of the agency in question arising from the nature of an irrevocable power of attorney to sell land—described by Lord Cozens-Hardy M.R. as an 'equitable conveyance'. Warrington L.J. spoke of a contract for the sale of land as being 'indeed in equity itself a conditional disposition'. Another important ground is that by reason of the nature of this power of attorney the agent was empowered to act without the need of any further communication with his principal. Scrutton L.J.'s vigorous dissent rests mainly on the view that at the date of the sale by the auctioneer Müller was an alien enemy, so that the transaction amounted to trading with the enemy and was void at common law.

Where the agent in this country of an enemy holds an authority coupled with an interest, for instance, for the purpose of protecting or securing his own interest, there is much to be said for the view that it is not abrogated by the outbreak of war.

B. BY STATUTE

The Trading with the Enemy Act, 1939, contains ample authority for the view that the interposition of an agent cannot, for the purposes of the Act, cure a transaction which is in substance one with an 'enemy' as extensively defined by that Act. For instance, section 1 in defining the offence of trading with the enemy includes transactions 'for the benefit of an enemy'; subsection 3 thereof declares that 'Any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy'; and 'enemy property' is defined by subsection 8 of section 7 (relating to the custody of enemy property) as 'any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject'.

¹ Above, p. 60.

CHAPTER 10

BILLS OF EXCHANGE AND PROMISSORY NOTES: BUILDING CONTRACTS: SHIPBUILDING CONTRACTS

BILLS OF EXCHANGE AND PROMISSORY NOTES¹

We start with the common law prohibition of trading with the enemy (which includes non-commercial intercourse) and the provisions of the Trading with the Enemy Act, 1939.² We shall use the word 'enemy' in the territorial sense and in the sense of the definition contained in the Act,³ as they are substantially identical.

The effect of the statutory provisions may be summarized by saying that when there is any dealing with a bill of exchange between a person in this country and an enemy or some person acting on behalf of an enemy—be it drawing, acceptance, indorsement or other transfer—that dealing at any rate is void and ineffective; that any dealing with a bill of exchange which is for the benefit of an enemy is void and ineffective; but that does not necessarily mean that a bill is avoided for all purposes by the fact that at some time before the outbreak of war a person who has become an enemy (or a person acting on his behalf) has been a party to a dealing with it.⁴ Moreover, even if none of the original or subsequent parties to a bill is an enemy, its 'acceptance, issue or subsequent negotiation' may be 'affected with... illegality' arising from intercourse with the enemy, with the consequences described in section 30 of the Bills of Exchange Act, 1882; for instance, *A* and *B* being resident in this country, if *A* agrees to lend *B* £100 for the purpose, known to *A*, of enabling *B* to trade with the enemy, and *A* then accepts a bill for £100 drawn by and payable to *B*.

In *Willison v. Patteson*,⁵ which may probably be regarded as the leading case, the Court of Common Pleas treated bills of exchange as

¹ See Report of Committee on Limitation of Actions and Bills of Exchange, 1945, Cmd. 6591, pp. 11, 12.

² The Trading with the Enemy Proclamation, No. 2, of September 9, 1914, contained the main provisions that were relevant during the War of 1914 to 1918, and was amended from time to time. In 1794 an Act, now expired, was passed to deal with the matter.

³ See above, p. 176.

⁴ See *Wilson v. Ragosine & Co.* (1915) 31 T.L.R. 264 (assignment for valuable consideration before the outbreak of war); *Haarbleicher and Schumann v. Baerselman* (1914) 137 Law Times Journal 564.

⁵ (1817) 7 Taunt. 439.

falling within the general rule that no contract can be made during war between a person in this country and a person in the enemy country, and declined to enforce after the war three bills of exchange drawn by an enemy national in enemy territory upon the defendants in London, accepted by them and indorsed by the drawer in favour of the plaintiff, an 'English-born subject' then resident in enemy territory. 'At the time of drawing, accepting and endorsing these bills of exchange, France and England were in an open state of war with each other, and [the drawer] was then an alien enemy.'¹ Gibbs C.J. said 'an alien enemy resident in France has no right to draw on this country for a fund due to him here'; that is 'the very sort of communication which the policy of the law meant to prevent'.²

The Act of 1939, section 1 (2), after a general definition of trading with the enemy, provides that

a person shall be deemed to have traded with the enemy... (a) if he has
'(ii) paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory, or

(iii) performed any obligation to, or discharged any obligation³ of, an enemy, whether the obligation was undertaken before or after the commencement of this Act...'

The definition of 'enemy' has already been quoted,⁴ and section 1 (3) provides that 'any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy'.

Moreover, section 4 (1) provides that 'neither a transfer of a negotiable instrument by or on behalf of an enemy,⁵ nor any subsequent

¹ At p. 440.

² The prisoner of war cases form an exceptional class and have already been dealt with above, pp. 53-60, 117-118.

³ Suppose that the only enemy party is, for instance, a pre-war indorser of a bill, would payment by an acceptor in this country be prohibited on the ground that payment discharges the obligation of an enemy; that is, would *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* [1941] 1 K.B. 424 apply? No, it is submitted; the acceptor is discharging his own obligation, not the enemy's. It would surely be wrong to hold that the acceptor must not discharge his own obligation merely because upon his doing so the obligation of an enemy would be discharged by operation of law. See below, p. 236.

⁴ Above, p. 66.

⁵ Upon Section 6 (2) of the Trading with the Enemy Amendment Act, 1914, which resembles this provision, it was held that the defect in title applies equally to the case of transfer to persons carrying on business in a neutral country to whom an enemy indorses a bill after the outbreak of war; they cannot sue an English acceptor: *Weid v. Fruhling & Goschen* (1916) 32 T.L.R. 469.

transfer thereof, shall, except with the sanction of the Treasury, be effective so as to confer any rights or remedies against any parties to the instrument'; and subsection 4 of the same section enables any person in doubt as to the lawfulness of satisfying a claim made upon him in respect of a negotiable instrument to pay the money into Court and thus obtain a good discharge.

These provisions make many of the decisions of earlier wars¹ of secondary importance.

P, a person in this country, bought before the war goods from *V*, a person who became upon the outbreak of war an enemy. Before the war *P* had accepted a bill of exchange for the price which is payable after the outbreak. Can *P* lawfully pay the bill? Yes, if the holder of the bill is an enemy and the Board of Trade requires payment to the Custodian under section 7 (1) (a) of the Act, or vests the debt in the Custodian under section 7 (1) (b).² Likewise, if the holder is not an enemy, for instance, a neutral Bank, and there has been no transfer which conflicts with section 4 of the Act, *P* can lawfully pay the bill and must pay it.

Effect of interference by war with presentment for acceptance or payment. Many cases of impossibility or impracticability of presentment will be adequately dealt with by ss. 41 and 46 of the Bills of Exchange Act, 1882.

Section 41 (2) (b) provides that presentment for acceptance is excused, so that the bill may be treated as dishonoured by non-acceptance, 'where, after the exercise of reasonable diligence, such presentment cannot be effected'.

Section 46 (1) provides that 'Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder,³ and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.'

Section 46 (2) provides that 'Presentment for payment is dispensed with, (a) where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected...'⁴

When this provision, which has no special reference to war conditions, operates to relieve a party from the necessity of a presentment

¹ See Campbell, *Law of War and Contract*, pp. 184 *et seq.*

² And see the supplementary power given to the Custodian by section 7 (2), which is useful in cases of doubt, e.g. as to whether the creditor is in fact an enemy.

³ *Patience v. Townley* (1805) 2 Smith 223 (place of payment in a state of siege).

⁴ *In re Francke & Rasch* [1918] 1 Ch. 470, 479.

in enemy or enemy-occupied territory which would involve illegal intercourse with the enemy, the effect is merely to expunge the obligation of presentment and not to render the obligation to pay the amount of the bill illegal; for such a construction, so far from relieving the party under the obligation of presentment, would place him in a worse position by precluding him from recovering the amount of the bill.¹

Sections 69 and 70 relating to lost instruments should be borne in mind. Without prejudice to section 46 (1) of the Act of 1882, the Bills of Exchange Act, 1914 (which expired in 1922) excused delay in presentment for payment of a bill payable outside the British Islands where the delay was caused by circumstances arising 'out of the present war', and enabled proof of a bill in any proceedings to be given by means of a certified copy in the case of actual or presumed loss of the bill as the result of the war.

Where bills of exchange were accepted before the outbreak of war and fell due in this country or in the enemy country during the war, the drawer who was resident in enemy territory was not allowed after the war to recover interest on the bill from the acceptors in this country in respect of any period during the war, because there was no breach of duty in not paying during the war, so that interest did not begin to run until the war came to an end.²

Section 72 (5) of the Act of 1882 provides that 'Where a bill is drawn in one country and payable in another, the due date thereof is determined according to the law of the place where it is payable.'

It is not infrequent in time of war to find belligerent countries postponing by statute or decree the due date of bills of exchange and promissory notes. Provided that the statute or decree is not penal or confiscatory, an English Court will give effect to it.³

¹ *Cornelius v. Banque Franco-Serbe* [1942] 1 K.B. 29. Note also that in the case of a bill governed as to presentment by English law an acceptance to pay at a particular specified place without the addition of a requirement to pay there *only and not elsewhere* is a general acceptance (Bills of Exchange Act, 1882, s. 19), so that an acceptance to pay in an enemy or enemy-occupied country is general and under section 52 of the Act presentment for payment may be dispensed with: *Banku Polski v. K. J. Mulder & Co.* [1941] 2 K.B. 266; [1942] 1 K.B. 497. As to extending the period within which presentation for acceptance or for payment, protest and certain other acts may take place, see Art. I (XVIII) of the (Versailles) Treaty of Peace Order.

² *Biedermann v. Allhausen & Co.* (1921) 37 T.L.R. 662; followed in *N. V. Ledeboter, etc. v. Hibbert* [1947] W.N. 174.

³ *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525; *In re Francke & Rasch* (*supra*).

BUILDING CONTRACTS

In *Metropolitan Water Board v. Dick, Kerr & Co.*¹ there was a pre-war measure and value contract (supplemented by a contract made after the outbreak of war) for the construction of a reservoir over a period of six years. Work began, apparently, on August 16, 1914, just after the outbreak of war, and continued until the contractors (the defendants) received from the Ministry of Munitions in February 1916 a notice requiring them in pursuance of certain statutory powers 'to cease work on your contract for the Metropolitan Water Board' and 'to comply with such instructions with regard to your plant and the labour at your disposal as may be conveyed to you' on behalf of the Minister of Munitions. Here we get the element of illegality. It was clearly illegal to proceed with the contract; there was no dispute about that. But the illegality would not last for ever, and, in the Metropolitan Water Board's action for a declaration that the contracts were still binding on the parties, the question at issue was whether the effect of the prohibition, coupled with the compulsory sale and dispersal of the plant, was such as to frustrate and discharge the contracts. The Court of Appeal and the House of Lords, with the experience of *Horlock v. Beal* and *Tamplin's* case behind them, had little difficulty in holding that the contracts were discharged. To hold that they were still binding would be, said Viscount Finlay L.C.² adopting the words of Rowlatt J. in the *Distington* case,³ 'not to maintain the original contract, but to substitute a different contract for it'. 'The whole character of such a contract for construction may be revolutionized by indefinite delay, such as that which has occurred in the present case, in consequence of the prohibition.'⁴ And Lord Dunedin said:⁵ 'The difference between the new contract and the old is quite as great as the difference between the two voyages in the case of *Jackson v. Union Marine Insurance Co.*'⁶

¹ [1918] A.C. 119.

² At p. 127.

³ [1916] 1 K.B. 811, 814.

⁴ Per Viscount Finlay L.C. at p. 126. It is unnecessary to discuss cases arising under the Courts (Emergency Powers) Act, 1917, which gave the Court power to suspend or annul certain contracts, e.g. *Charles Schofield & Co. v. Maple Mill* (1918) 34 T.L.R. 423.

⁵ At p. 129.

⁶ Above, p. 140. The contract before Ridley J. in *Innholders' Co. v. Wainwright* (1917) 33 T.L.R. 356, would to-day probably be held to be dissolved by frustration, and not merely suspended. In *Mertens v. Home Freeholds Co.* [1921] 2 K.B. 526, upon a building contract, the defendant (the builder) was not allowed to plead as an answer to an action for damages that the contract had been frustrated by reason of the refusal of a licence by the Minister of Munitions, because he had brought about the refusal by his own act.

SHIPBUILDING CONTRACTS

The doctrine has also been applied to contracts for the building of ships. In two similar cases, *Federal Steam Navigation Co. v. Sir Raylton Dixon & Co.*¹ and *Woodfield Steam Shipping Co. v. J. L. Thompson & Sons*,² the contracts were entered into during the war (and in the former case supplemented by another contract made during the war) and were held to be frustrated by reason of Government intervention which took the form of suspending the building of ships of the kind contracted for, while permitting the building of ships of a different kind. The Government control was 'of such a character that it completely transformed the nature of the contract and the ambit of the obligation entered into'.³

¹ (1919) 1 Ll. L. Rep. 63; 64 S.J. 67. 'In all these cases one must examine first the degree of interference, and, secondly, its duration'—per Lord Birkenhead L.C. 1 Ll. L. Rep. at p. 65.

² (1919) 64 S.J. 67.

³ 1 Ll. L. Rep. at p. 66. *In re an Arbitration between New Zealand Shipping Co. and Soc. des Ateliers et Chantiers de France* [1917] 2 K.B. 717, turned upon the meaning of a clause in a contract for the building of a ship and contains a discussion of the rule that a party to a contract cannot take advantage of his own wrongful act.

CHAPTER 11

COMPANIES

Under this heading it is proposed to deal, firstly, with the effect of the outbreak of war upon companies registered under the Companies Act, 1929, and other corporations, which by place of incorporation, place of carrying on business, national status of members¹ or otherwise, may become affected with enemy character; secondly, with the supervision, control, and winding up of certain businesses during war; and, thirdly, with the effect of war upon the position of enemy shareholders, debenture-holders and directors. Having regard to the comparatively recent development of joint-stock enterprise on a large scale, it is not surprising to find that on both these points the inquirer at the outbreak of the War of 1914 to 1918 found remarkably little authority to guide him. As Lord Parker said:² 'Joint-stock enterprise and English legislation and decisions about it have developed mainly since this country was last engaged in a great European war, and have taken little, if any, account of warlike conditions.'

(a) THE POSITION OF THE CORPORATION ITSELF

We have already had occasion³ to refer to this matter for the limited purpose of determining the circumstances in which a corporation when suing can be defeated by the plea of alien enemy, and we saw that a corporation is regarded as enemy for that purpose

(i) when it owes its legal existence and incorporation to the laws of an enemy State;

(ii) when, wherever incorporated, it has acquired enemy character by reason of the hostile residence or activities of its principal agents or other persons in *de facto* control of its activities;

¹ It should be remembered that, apart from war, aliens may be shareholders in a British company, and even subscribers to its Memorandum of Association; indeed, all the shareholders may be aliens.

² *Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd.* [1916] 2 A.C. 307, 344.

³ Above, p. 63, where the *Daimler* case is discussed. And see Farnsworth, *Residence and Domicil of Corporations*, pp. 125 *et seq.* The statement of Bailhache J. in *W. L. Ingle v. Mannheim Insurance Co.* [1915] 1 K.B. 227, 231 (top), to the effect that dealings with the branch office in England of a company having its head office in enemy territory in respect of the business carried on in England are lawful, must be regarded as overruled by Lord Parker's speech in the *Daimler* case and its subsequent acceptance (see above, pp. 63, 64).

(iii) when, even though registered in the United Kingdom, it is carrying on business in enemy territory.

There are, however, other aspects of the matter, and, in particular, trading with the enemy and the position of contracts with an enemy corporation. There can be no doubt that a corporation which is an enemy under one of these rules for the purpose of the plea of alien enemy is also an enemy for the purposes of the prohibition against trading with an enemy and of the rules governing the effect of war upon contracts with an enemy in the territorial sense; though, as we shall see, the converse proposition is not true. Lord Parker, after defining in the paragraph already quoted¹ the circumstances which invest a British company with enemy character, added: 'A person knowingly dealing with the company in such a case is trading with the enemy.'²

In *Elders and Fyffes, Ltd. v. Hamburg-Amerikanische Packetfahrt A.-G.*³ it was unsuccessfully argued that the *Daimler* doctrine operated to convert a company registered in England into a foreign company on the ground that the majority of the shares were held in the United States of America (it seems probable that the writ was issued when that country was still neutral in the War of 1914 to 1918) and that the directors acted upon instructions from that country. The object of this argument, which was advanced by an enemy defendant, was to impute to the British company American character and so avoid the abrogation of certain long-term contracts, which must have happened if it took its character from its place of registration, i.e. England. A British company, even if foreign control be proved, does not cease to be a British company, nor would foreign control protect British directors from liability for trading with the enemy.

In *Re Badische Co.*⁴ Russell J. applied the *Daimler* doctrine for the purpose of the abrogation upon the outbreak of war of executory contracts with a British registered company controlled in Germany.

Turning to the legislation of the present war, which is simpler and more compact than that of the War of 1914 to 1918, we have seen⁵ that by section 2 (1) of the Trading with the Enemy Act, 1939,⁶

the expression 'enemy' for the purposes of this Act means...

'(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy;

¹ P. 64.

² [1916] 2 A.C. at p. 345.

³ (1917) 34 T.L.R. 4; (1918) *ibid.* 275 (C.A.).

⁴ [1921] 2 Ch. 331.

⁵ Above, p. 66.

⁶ As amended by the Defence (Trading with the Enemy) Regulations, 1940.

(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty; and

(e) as respects any business carried on in enemy territory,¹ any individual or body of persons (whether corporate or unincorporate)² carrying on that business.'

Upon this definition it must be noted that it is given 'for the purposes of this Act', and Lord Greene M.R. in the case of *In re an Arbitration between N. V. Gebr. van Udens Scheepvaart en Agentuur Maatschappij and Sovfracht*³ said that the Act

'does not purport to impose or define enemy status otherwise than for the purposes of the Act, which are (so far as relevant) the prohibition of dealings with persons who, for the purposes of the Act, are to be regarded as enemies. It achieves its object not by any general extension of the class of enemies at Common Law. A person, therefore, who is not an enemy at Common Law is not by the Act made an enemy. All that the Act does is to prohibit certain dealings with a person of the defined class and to make certain provisions affecting his property. Except for the purposes of those prohibitions and those provisions, his status is unaffected.'

There can be no doubt that the prohibition of trading with the enemy comprises the carrying out of a contract with a company carrying on business in enemy-occupied territory as from the date of the occupation and abrogates a contract which is executory at that date and is of the type stated above⁴ to be abrogated by the outbreak of war. If the effect is to inflict hardship upon a company which is a 'friendly' enemy as was the company in that case, the remedy is by legislation. It is difficult to see how a licence from the Crown can *ipso facto* reintegrate a contract once abrogated, though it may authorize the British party to contract with the 'friendly' enemy so as to produce that effect.⁵

(b) SUPERVISION, CONTROL AND WINDING UP OF A 'BUSINESS'⁶

Section 3 (1) of the Trading with the Enemy Act, 1939, enables the Board of Trade to authorize an inspector to inspect the books and

¹ Which is defined in section 15 (1) of the Act.

² Substituted by S.R. & O. 1940, No. 1289, for 'incorporate', a misprint.

³ [1941] 3 All E.R. 419, 425; reversed in the House of Lords on other points. See above, pp. 53, 68.

⁴ See above, p. 87.

⁵ See above, p. 97.

⁶ S.R. & O. 1940, No. 1740 (now revoked), forbade a 'body corporate resident in the United Kingdom', except by consent of the Treasury, 'to transfer any trade, business or undertaking carried on by it to a person not resident in the

documents of any person (which includes a corporation) and to require any person to give information in respect to any business carried on by him. Section 3 (2) enables the Board of Trade to appoint a 'supervisor' when that is necessary for ensuring compliance with section 1 of the Act which contains the prohibition of trading with the enemy.

Section 3 A (introduced into the Act by the Defence (Trading with the Enemy) Regulations, 1940)¹ empowers the Board of Trade 'where any business is being carried on in the United Kingdom by, or on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies' to make either

(a) a 'restriction order' prohibiting the carrying on of the business absolutely or *sub modo*, or

(b) a 'winding up order' requiring the business to be wound up.²

Having made either of these orders, the Board of Trade may appoint a 'controller to control and supervise the carrying out, of the order, and, in the case of a winding up order, to conduct the winding up of the business, and may confer on the controller any such powers in relation to the business as are exercisable by a liquidator in the voluntary winding up of a company in relation to the company', and such other powers as may be necessary.³

It will be noticed that these provisions do not expressly refer to the winding up of a *company*, but the Board of Trade may confer on the controller the powers of a liquidator in the voluntary winding up of a company (including power to convey or transfer any property). These powers are contained in the Companies Act, 1929 (see in particular section 248), and they include the power to wind up the company's affairs and distribute its assets and then bring about the termination of its existence by dissolution (section 236). It is not clear whether a

United Kingdom' or 'to do any act so as to transfer out of the United Kingdom the central management and control of the trade, business or undertaking'.

¹ S.R. & O. 1940, No. 1092. See a note in Krusin and Rogers, *Solicitors' Handbook of War Legislation*, 3rd Sup. p. 87.

² The nature of such a winding up is fully considered in *In re Banca Commerciale Italiana* [1943] 1 All E.R. 480. The Board of Trade is empowered to apply to the Court for the winding up of the company.

³ An Order in Council dated August 15, 1941 (S.R. & O. 1941, No. 1210) empowered the Board of Trade to direct that any company registered in the Channel Islands shall be registered in England or Scotland, whereupon it will be 'treated for all purposes as if it were a company incorporated under the Companies Act, 1929, and registered under that Act in England or in Scotland, as the case may be, and not elsewhere'. And see S.R. & O. 1945, No. 1533.

controller can, in the exercise of these powers, bring about the dissolution of a company whose 'business is being carried on in the United Kingdom by, or on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies'; at any rate the mere appointment of the controller does not put into liquidation the company of whose business he is in control.¹ If it is desired to put the company into liquidation, the Board of Trade can do so, for under subsection 8 of section 3 A 'where the business is being carried on by a company the Board of Trade may present a petition for the winding up of *the company* [italics ours] by the Court, and the making of an order under this section shall be a ground on which the company may be wound up by the Court'.

Many of the decisions upon the legislation of the War of 1914 to 1918 are relevant. In particular, the provisions of section 3 A just quoted follow closely those of subsection 7 of section 1 of the Trading with the Enemy Amendment Act, 1916,² under which it was held that if the Board of Trade conferred upon a controller power to sue in the name and on behalf of the 'person, firm or company' for pre-war debts, he could not be defeated by the plea of alien enemy.³ But the appointment of a controller does not have the effect of reviving any pre-war contracts which were abrogated upon the outbreak of war by reason of the fact that one party was an enemy or that their performance would involve intercourse with the enemy.⁴

It seems probable that certain other decisions upon section 1 of the Trading with the Enemy (Amendment) Act, 1916, also apply to section 3 A. In *In re W. Hagelberg A.-G.*⁵ it was held that when a business carried on by a company in the United Kingdom is being wound up, the assets of that business are not available for creditors whose debts arise out of transactions or dealings with the company in respect of business being carried on outside the United Kingdom. In *In re Kastner & Co.*⁶ it was held that the controller had power to

¹ *In re Fr. Meyers Sohn* [1917] 2 Ch. 201, 203.

² The judgment of Younger L.J. in one of the later of the many decisions upon this Act, *Meyer & Co. v. Faber* (No. 2) [1923] 2 Ch. 421, 442, contains a useful commentary upon some of the leading decisions upon it. He said at p. 446: 'The fragmentary character of a winding up [i.e. of a business] under the Act, the essential difference between such a winding up and the liquidation of a company or the bankruptcy of a firm or individual is shewn by *In re Dieckmann* [1918] 1 Ch. 331'. See also *In re Vulcan Coal Co.* [1922] 2 Ch. 60.

³ *Continho Caro & Co. v. Vermont* [1917] 2 K.B. 587.

⁴ *In re Coutinho Caro & Co.* [1918] 2 Ch. 384.

⁵ [1916] 2 Ch. 503; see also *In re Anglo-Austrian Bank* [1920] 1 Ch. 69.

⁶ [1917] 1 Ch. 390.

deal with the whole of the assets of the company notwithstanding the existence of debentures secured by a floating charge and the appointment of a receiver on behalf of the debenture-holders; his appointment had been made by the Court after the appointment by the Board of Trade of a supervisor of the company's business, who later became the controller, and in ignorance of the pending proceedings before the Board of Trade for the winding up of the company. In *In re Th. Goldschmidt*¹ it was held that the expression 'assets of the business' contained in subsection 3 of section 1 of the Act of 1916, the wording of which closely resembles that of subsection 3 of section 3 A of the Act of 1939, does not include the company's uncalled capital. Younger J. said that a business with which the Board of Trade was empowered by the Act of 1916 to deal

'is treated by the Act as an entity separate and distinct from any other property, whether in the United Kingdom or abroad, and from any other business not in the United Kingdom, of the person, firm, or company owning or controlling it; that, accordingly, it is only the debts of the business, as distinct from the debts of such person, firm, or company irrespective of the business, that under the Act are to be paid; and it is only the assets of the business, as distinct from the general assets of the person, firm, or company that are made, so far as the Act is concerned, available for their discharge.'

Some light is thrown upon the nature of the enemy's interest in property which has been vested in the Custodian, by the decision of Russell J. in the case of *In re Münster*² upon the Trading with the Enemy Amendment Act, 1914, the language of which differs from that of the Act of 1939, though the general effect as regards the vesting of enemy property in a Custodian is similar. There the learned judge held that the effect of the vesting is to remove the property 'from the control and from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the enemy will recover, and to what extent he will recover, the beneficial ownership will depend upon the arrangements made at the conclusion of Peace...'. Meanwhile, the statute caused 'the beneficial ownership to be and remain in statutory suspense and in abeyance', and the Custodian receives the profits and gain arising from the property such as rent from land and dividends from shares 'in respect of' the enemy but not 'in any sense as an agent or receiver or trustee for' him.

¹ [1917] 2 Ch. 194, 197; see also *In re Fr. Meyers Sohn*, *ibid.* 201.

² [1920] 1 Ch. 268, 278; and see *In re Ring Springs, Limited's Letters Patent* [1944] 1 Ch. 180.

Amongst other powers, the Controller has power to discharge 'debts due to the creditors of the business', and some light is thrown upon the meaning of this expression in *In re Banca Commerciale Italiana*.¹

(c) THE SHAREHOLDER'S CONTRACT OF MEMBERSHIP

If a shareholder of enemy nationality is in British or (probably) in allied² or neutral territory, then it seems to follow from the decisions already discussed³ and, in particular, *Porter v. Freudenberg*⁴ and *Schaffenius v. Goldberg*,⁵ that, upon principle and apart from the emergency legislation to be discussed later, his contract of membership of a British company is unaffected by the outbreak of war and he continues to enjoy the rights and be subject to the liabilities of the normal British shareholder.

If, however, the shareholder is an enemy in the territorial sense—the sense in which the word 'enemy' is used in what follows—then a different situation arises. We may look upon his share in a British company both as a contract and as a piece of property.⁶ Viewed as a contract, one of two things might, it seems, happen to it upon the outbreak of war. (i) The contract might be dissolved, in which event he would drop out entirely except that at the end of the war he would be entitled to come and claim from the company the value of his share at the outbreak of war. This is the partnership analogy.⁷ What is to happen if by this process of dissolution of the contract of membership the number of shareholders is reduced below seven in a public, or two in a private, company, as would occur, for instance, in the case of the Continental Tyre and Rubber Company, the plaintiffs in the *Daimler* case previously discussed? (ii) Or we might regard the contract of membership as suspended⁸ and not dissolved, so that during the war the right to dividends and perhaps the liability for calls made during the war are in suspense and revive upon the conclusion of the war, whereupon the enemy would once more become fully a shareholder. The argument that private enemy property on land is not

¹ [1942] 1 Ch. 406, following decisions upon the Act of 1916.

² See *Lepage v. San Paulo Copper Estates* (1917) 33 T.L.R. 457.

³ Above, p. 114.

⁴ [1915] 1 K.B. 857 (C.A.).

⁵ [1916] 1 K.B. 284 (C.A.).

⁶ That no shares can lawfully be allotted to an enemy is obvious, for it would involve the making of a contract with him: *Eichengruen v. Mond* [1940] 1 Ch. 785, 787.

⁷ *Hugh Stevenson & Sons'* case [1918] A.C. 239.

⁸ This is the view adopted by the editor of Lindley on *Companies* (6th ed. 1902), i, p. 53, citing *Ex parte Boussmaker* (1806) 13 Ves. 71, and by Pitt Cobbett, *op. cit.* (5th ed.), ii, p. 113.

forfeited to the Crown unless the Crown sets in motion the procedure of 'inquisition by office',¹ supports either view—dissolution or suspension—because neither involves confiscation.

It now seems clear that the suspension theory is the right one. In *Rex v. London County Council*² Lord Reading C.J. intimated his opinion *obiter* that an alien enemy (apparently resident or carrying on business in enemy territory) could not vote by proxy in respect of his shares in an English company, but the question whether the rights of the enemy shareholders and directors resident in Germany were suspended or not, though argued, was not decided. Later in *Robson v. Premier Oil and Pipe Line Co.*³ the Court of Appeal definitely refused to allow an enemy corporation to vote by proxy⁴ in respect of shares in an English company, resting their decision upon the general prohibition of intercourse, commercial or otherwise, with enemies across the line of war but in no way dissenting from the judgment of Sargant J., based both upon the incapacity of a proxy to act on behalf of an enemy principal and upon the suspension of the right of an enemy shareholder to vote during the war.

These two cases throw some weight into the scale of the suspension theory, because it does not seem to be doubted that the shares continue to exist as contracts and not merely as pieces of property, though the rights attached to them are in suspense during the war. Further, there are several passages⁵ in the speeches in the House of Lords in the *Daimler* case which affirm with complete confidence that the rights of enemy shareholders are placed in suspense by the war. In the case of *In re Anglo-International Bank*,⁶ the Court of Appeal held that the right of shareholders having registered addresses in enemy-occupied territory to receive notices of meetings of the company was in suspense during the war and, accordingly, that the company could treat them as being not entitled to receive notices of meetings held during the war—a decision which involves the opinion that they remained shareholders whose rights are in suspense.

Moreover, the state of suspense is capable of being determined by the vesting of the shares in the Custodian of Enemy Property under section 7 of the Trading with the Enemy Act, 1939. Thus in a case⁷

¹ See above, p. 125.

² [1915] 2 K.B. 466, 478.

³ [1915] 2 Ch. 124 (C.A.)

⁴ It is probable, though not certain, that the proxies were granted during the war.

⁵ See [1916] 2 A.C. 307; Lord Shaw twice at p. 330; Lord Parmoor twice at p. 352. (The fact that these two noble lords were largely dissentient does not impair their authority on this point.)

⁶ [1943] Ch. 233.

⁷ *In re R. Pharaon et Fils* [1916] 1 Ch. 1 (C.A.).

arising upon the Trading with the Enemy Amendment Act, 1914, now repealed, where a block of shares in an English company amounting to 16,250 out of a total of 16,501 belonged to a firm of alien enemies carrying on business in the Turkish Empire and were vested in the Custodian, the Court of Appeal held that he need not remain purely passive. He inherits the character and powers of a shareholder and may, without asking the Court for its sanction, exercise all the rights of a shareholder to which his voting power entitles him. He can receive dividends¹ and vote at general meetings, and (if he prefers cash to shares) he may take steps, by signing a requisition, to have an extraordinary general meeting convened for the purpose of submitting a resolution for the winding up of the company.

Some inference in favour of the continued existence of the share as a contract may be drawn from section 2 (1) of the Trading with the Enemy Amendment Act of 1914, though not specifically re-enacted during the recent war because it is covered by more general provisions. That subsection directed that 'any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid...to the Custodian...', a provision which clearly contemplated the accrual of dividends or interest to an enemy shareholder or debenture-holder, though not receivable by him until after the end of the war, and even then only if the treaty of peace should not otherwise provide.

Section 5 of the Trading with the Enemy Act, 1939, which applies to 'annuities, stocks, shares, bonds, debentures or debenture stock registered or inscribed in any register, branch register or other book kept in the United Kingdom', provides that if any securities of the kinds enumerated above are transferred by or on behalf of an enemy (as defined by the Act), or, being securities issued by a company within the meaning of the Companies Act, 1929, are allotted or transferred to or for the benefit of an enemy without the consent of the Board of Trade, the transferee shall not thereby acquire any rights or remedies in respect of those securities except with the sanction of the Board of Trade; and no body corporate by whom the securities are issued or managed may give effect to the transfer.

Section 7 of the Trading with the Enemy Act, 1939,² enables the

¹ A resolution directing that dividends due to shareholders resident in enemy countries should be paid out of assets in those countries is void: *Aramayo Franche Mines v. Public Trustee* [1922] 2 A.C. 406.

² As amended by paragraph 4 of the Defence (Trading with the Enemy) Regulations, 1940.

Board of Trade to vest any 'enemy property' in the widest sense of the term in a Custodian of Enemy Property and requires the payment to him of money (including dividends) which but for the existence of a state of war would be payable to or for the benefit of an enemy.

Taking the Treaty of Versailles as a sample of the Peace Treaties of 1919-1920, we find that by the terms of the Annex referred to in Article 297 (d) all the exceptional war measures, such as vesting orders and orders for the winding up of businesses or companies, were agreed to be considered as final and binding upon all persons subject to any reservations contained in the treaties. By paragraph 10 of the same Annex Germany undertook to

'deliver to each Allied or Associated Power all securities, certificates, deeds or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power—'

a provision which suggests the continued legal validity of the obligations evidenced by these instruments.

On the whole, the conclusion would appear to be that, subject to any contrary provisions in the Treaty of Peace, unless the company has been wound up during the war, the ex-enemy shareholder would resume the enjoyment of his shares at the end of the war.¹ If this view is correct, the partnership analogy does not apply,² and the analogy is not a true one, because it is of the essence of a partnership that there should be intercourse between the partners, and it is difficult to see how a partnership can continue to function without it; a partnership is not a legal entity, though for purposes of suing and being sued it is convenient that the Rules of the Supreme Court³ should treat it as such. On the other hand, a company is a legal person distinct from its shareholders and, provided that it has directors or other agents in this country who are free from enemy control, there is no reason why it should not continue its operations. Any other conclusion would produce chaos, for there must have been during the War of 1914 to 1918 or that of 1939 to 1945 thousands of British companies who have enemy shareholders on their registers.

If a share in a company is regarded as a piece of property, as it certainly is, there is nothing startling in the view that it survives the

¹ Whether or not he would be entitled to recover any dividends that may have accrued upon the shares during the war, must remain in doubt: *In re Münster* (*supra*).

² See below, pp. 282-287.

³ Order 48A.

war and that the ex-enemy owner of it once more resumes the enjoyment of his ownership, together (possibly) with dividends which have accrued upon it,¹ unless it or the dividends have been confiscated by the Crown by the ancient and appropriate process or by legislation or have been surrendered by the treaty of peace.² Subject to similar events, the ex-enemy resumes the enjoyment of his ownership of a horse or a piano in this country, including the progeny of a mare.

Debentures. A debenture is an instrument which evidences a debt due to a company and usually mortgages or charges some or all of the assets of the company for the purpose of securing the debt. A debenture is both evidence of a contract and a piece of property. It differs from a share in that it does not normally give the holder any power of controlling the activities of the company except in certain specified events when his security is in danger. During the war the enemy holder cannot transfer it, and the interest must not be paid to him; but, subject to the causes of loss which we have stated to be applicable to shares, he is entitled to resume the enjoyment of his ownership of it at the end of the war, or its proceeds if it has been paid off, together with accumulations of interest which have accrued upon it.³

Directors. The editor of 'Pitt Cobbett'⁴ expresses the view that upon the outbreak of war 'enemy directors would *ipso facto* vacate their seats, although retaining otherwise such rights as belong to enemy shareholders'. So far as we are aware, there is no express decision upon the position of directors, but the *Daimler Co.'s* case in the House of Lords contains a number of passages⁵ which bear witness to the suspension of the rights of enemy directors during the war. What happens upon the conclusion of peace, supposing the company still to exist, is not stated, but in essence the relation of a director to his com-

¹ Note, however, the slender nature of the enemy's interest in shares which were vested in the Custodian during the War of 1914 to 1918, and in the dividends accruing upon them: *In re Münster (supra)*.

² On the *situs* of shares, see Dicey, pp. 137, 995, 996, and two American cases reported in *Décisions des tribunaux arbitraux mixtes*, vol. v (1925), p. 255.

³ Phillipson, *Effect of War on Contracts* (1909), p. 104 (n) says that after the South African War 'the British Government, as successor to the Transvaal Government, paid all arrears of debenture interest to British shareholders of an enemy company—the Pretoria-Pietersburg Railway Co. Ltd.' Reference, however, to the Report of the Transvaal Concessions Commission (Cd. 623), pp. 58, 59, shows that the company was incorporated in London, though operating in the Transvaal. The Government of the South African Republic had guaranteed the principal of and interest on the debentures, and the British Government took over that Government's interest in, and liabilities in respect of, the company. So the case is quite exceptional.

⁴ *Leading Cases and Opinions on International Law* (5th ed.), ii, p. 113.

⁵ See Lord Atkinson [1916] 2 A.C. at pp. 325-326; Lord Shaw at p. 330; Lord Parmoor at p. 352.

pany is a contract of employment creating agency, and the general principles of the effect of war upon contracts of employment and agency discussed elsewhere in this volume¹ point towards the abrogation and not the mere suspension of this contract, so that their re-election would be necessary if it is desired that they should resume their office.

Shareholders, debenture-holders and directors in enemy-occupied territory. It is clear that care is required on the part of British companies in order to prevent these persons from suffering from British war measures primarily directed against enemy shareholders, debenture-holders and directors. For instance, it would be hard upon a director, resident in Holland, of a British company that his directorship should be allowed to lapse merely by reason of the occupation of his country by the enemy, but it does not follow that all enemy-occupied territory or all persons in enemy-occupied territory should be treated alike. Some very pertinent remarks upon this point were made by Lord Greene M.R. in the *Sovfracht* case.²

¹ Below, p. 227 and above, pp. 205-208. It was held that the effect of Article 299 (a) of the Treaty of Versailles and corresponding provisions of the other Peace Treaties of 1919-1920, upon the directorship of an enemy in a British company, is abrogation: *Fr. Meyer's Sohn Ltd. v. Meyer* (1927) *Décisions des M.A.T.*, vol. 7, p. 379.

² [1941] 3 All E.R. 419, 423.

CHAPTER 12

EMPLOYMENT: GUARANTEE

EMPLOYMENT

We have already dealt with Agency, which is a species of employment, and later we shall deal with the Solicitor's Retainer. This section is concerned with Employment generally, (1) with illegality and (2) with impossibility and frustration.

ILLEGALITY

In accordance with general principle no contract of employment can, during war, be validly made (a) between a person within British territory and a person voluntarily resident or carrying on business within enemy territory, or (b) wherever the parties may be, if it involves a person within British territory in intercourse with enemy territory or any person therein during the war; and a pre-war contract of employment is dissolved by reason of supervening illegality (a) if one party is within British territory and the other is voluntarily resident or carrying on business in enemy territory, or (b) if the contract in any other way involves intercourse with enemy territory or any person therein.¹

We have seen² that there is some evidence for the view that an enemy prisoner of war may enter into a valid contract of employment and enforce it.

¹ Suppose that during war between Great Britain and Germany, a British trading corporation contracts with a person in this country that as soon as the war is legally at an end he shall proceed to Germany and represent the corporation there. It is suggested that this is a valid contract.

² P. 55; and see *Sparenburgh v. Banuatyne*, there cited. The provisions of chapter II of the Regulations annexed to Hague Convention IV of 1899 and 1907 (Laws and Customs of War on Land) and of Section III of the International Convention of July 27, 1929, relative to the Treatment of Prisoners of War (Treaty Series No. 37 (1931)), governing the work of prisoners of war, should be consulted. The United Kingdom has signed and ratified all these Conventions, but in order to ascertain whether they are binding upon the United Kingdom in any particular war other factors must be considered, namely, the 'general participation clause' (Article 2 of Hague Convention IV of 1899 and 1907) and, in the case of the Convention of 1929, the question whether the enemy Power to whose forces the prisoner of war belongs is also a party. Note in the Convention of 1929 the important Article 82 which departs from the pernicious policy of the 'general participation clause', and Article 89; whether Article 82 is adequate to make the Convention binding upon a State which has ratified it, when at war

It should also be noted that the engagement of a British subject or the national of a neutral State to serve an enemy Power will usually result in his being affected with enemy character.¹

IMPOSSIBILITY AND FRUSTRATION

(a) The outbreak of war may produce a fundamental change in the character of the service: (b) the war may cause the servant or the subject-matter of his service to be no longer available.

(a) Before a war a seaman signs on for an ordinary commercial voyage. There breaks out a war of such a kind that changes the character of the voyage by exposing the ship, whether sailing under a belligerent flag or not, to a grave risk of capture or sinking by enemy action. Usually the contract thereupon comes to an end. It is no longer the contract made by the parties. The seaman would, or can reasonably assert that he would, either have declined to sign on for a voyage of that character, or would only have done so for much increased remuneration. If responsibility for the change in the character of the voyage can be laid upon one of the parties, he has committed a breach of contract. If it cannot be, it is a case of frustration. The ship is there; the seaman is there; either the shipowner or the seaman may wish to abandon the voyage; there is no impossibility of fact. To insist upon performance is to create a new contract for the parties, and, as Rowlatt J. said in the *'Distington case'*,² 'War does not create any contract'.

In *Burton v. Pinkerton*³ the Court of Exchequer held that the outbreak of war between Spain and Peru, followed by the conduct of the captain (the defendant) in placing the ship (which was British) virtually under the orders of the Peruvian supercargo on board, and in sailing as a tender to or consort of Peruvian ships of war, terminated the pre-war contract of service of the plaintiff, a seaman, by converting what was intended by him to be a purely commercial voyage into a warlike one,

with a State which has not, is a matter of some doubt. When one of these instruments applies, it is necessary to consider whether the employment of a prisoner of war rests upon administrative regulation or upon contract; for a case in which the Franco-German Mixed Arbitral Tribunal took the former view, see *Daniels v. Germany*, *Annual Digest*, 1927-1928, Case No. 373; see also Rosenberg in *American Journal of International Law*, xxxvi (1942), pp. 294-298 ('Accidents to Prisoners of War Employed in Private Enterprises').

¹ *Sparenburgh v. Bannatyne* (1797) 1 Bos. & P. 163; *The Endraught* (1798) 1 C. Rob. 22; *The Benjamin Franklin* (1806) 6 C. Rob. 350. See also as to the nationals of a neutral State Article 17 of Hague Convention V (Neutral Powers and Persons in Land Warfare).

² [1916] 1 K.B. at p. 814.

³ (1867) L.R. 2 Ex. 340. See also *The Justitia* (1887) 12 P.D. 145 and *Palace Shipping Co. v. Caine* [1907] A.C. 386.

which was a breach of contract. Illegality was discussed, but the decision rests on breach of contract. There is no reference to frustration. It is insisted that the seaman could not be compelled to perform an engagement fundamentally different from the one contracted by him. In *O'Neil v. Armstrong, Mitchell & Co.*¹ the plaintiff, a seaman, undertook to serve on board a newly-built torpedo-boat on a voyage from Newcastle to Yokohama. He apparently did not know whether she then belonged to the Japanese Government or not. After sailing the captain (by consent treated as the defendant) hoisted the Japanese flag, and during the voyage war broke out between China and Japan. The plaintiff left the ship at Aden, and claimed wages for the whole voyage. The Court of Appeal held that the act of the defendant's principals, the Japanese Government, in declaring war against China, completely changed the character of the voyage by exposing the plaintiff to new and additional risks and terminated the contract. In the words of A. L. Smith, L.J.,² 'the peace adventure had become frustrated and put an end to'. Stress is laid upon the fact that the alteration has been brought about by the defendant's principals, but it is submitted that the contract would also have come to an end if China had declared war against Japan, though it was probably essential to the plaintiff's recovery of the whole amount of the wages agreed for the voyage for him to establish the fact that it was due to the fault of the defendant's principals that the original contract was not completed.³ The Foreign Enlistment Act, 1870, was referred to, but the decision is not based on it.

In *Liston v. Owners of SS. Carpathian*⁴ twelve members⁵ of the crew of a British ship lying at Port Arthur and homeward bound refused on August 16, 1914, to proceed to sea without extra remuneration, on the ground that the outbreak of war between Great Britain and Germany and the ensuing danger of capture or injury from mines had terminated their pre-war engagements to serve upon an ordinary commercial voyage. The captain agreed to pay them extra remuneration, and the question of his authority to do so turned upon the effect of the outbreak of war and consequent risks upon the pre-war contracts of service. Lord Coleridge J. based his decision to the

¹ [1895] 2 Q.B. 70; *ibid.* 418.

² At p. 422. But I submit that the word 'frustrated' is not used *stricto sensu*.

³ *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

⁴ [1915] 2 K.B. 42. See also *Austin Friars Shipping Co. v. Strack* [1905] 2 K.B. 315 (pre-war contract); *Lloyd v. Sheen* (1905) 93 L.T. 174 (post-outbreak of war contract); *Sibery v. Connelly* (1905) 94 L.T. 198 (post-outbreak of war contract).

⁵ Their nationality is not stated. It is doubtful whether this decision would be followed to-day in the case of a British seaman.

effect that the seamen were entitled to recover the extra remuneration, upon the fact that the war risks in existence on August 16 (the mere outbreak of war would not be enough) were not in the contemplation of the parties when the contract was made, so that that contract came to an end when the risks arose.

The authorities cited above are cases upon the effect of the outbreak of war upon a pre-war contract of employment, but the principle involved has no necessary connexion with the outbreak of war, and precisely the same principle must be applied to a contract entered into after the outbreak of war when the character of the service which the employee is asked to perform differs fundamentally from the character of the service he contracted to perform. In *Palace Shipping Co. v. Caine*,¹ the seamen during the Russo-Japanese War contracted to serve on a voyage from Cardiff to Hong Kong and/or any other ports within limits which included Japanese ports; upon arrival at Hong Kong they were told for the first time that the ship, carrying a cargo of coal (which had been declared by both belligerents to be contraband), would proceed to Sasebo, a Japanese naval base, within the geographical limits of the contract. They were upheld by the House of Lords, on the ground that they had signed on 'for an ordinary commercial voyage to a neutral port' and were then asked to undertake a voyage to Sasebo which, in the words of Lord Macnaghten, 'would necessarily involve risks to life and property different from and in excess of those incident to the employment of seamen engaged in peaceful commerce'. This decision was applied in *Robson v. Sykes*,² where seamen engaged for a voyage of not more than two years' duration within very wide geographical limits were upheld by the King's Bench Division in their refusal to sail to a Spanish port which, though within the geographical limits of the articles, was situate in a part of Spain where a civil war (in existence when the articles were signed) was in progress, so that the voyage was likely to be attended with danger to themselves. Branson J. stated the principle to be that 'apart from special circumstances, a crew signing articles in the ordinary form must be taken to have engaged themselves to carry out an ordinary commercial voyage'.

(b) We now come to the cases where frustration is caused by the fact that one of the parties (usually the servant), or the subject-matter of the contract of service, is no longer available. In *Horlock v. Beal*³ the wife of a British seaman sued a British shipowner upon a pre-war allotment of part of her husband's wages. In May 1914 he signed on for a voyage not exceeding two years. On August 2 his ship arrived

¹ [1907] A.C. 386, 393. ² [1938] 2 All E.R. 612, 616. ³ [1916] 1 A.C. 486.

at Hamburg. On August 4 war broke out, and she was not allowed to leave. In November the officers and crew, including the plaintiff's husband, were removed from the ship and shortly afterwards interned. The House of Lords (with one dissentient) held that the contract of service was dissolved upon the outbreak of war by the impossibility of performance which supervened, one member of the majority preferring to fix that point of time in November. Many authorities relating to the special character of the seaman's contract were referred to, but a majority of their Lordships used the language of frustration and cited the familiar cases.

In *Marshall v. Glanville*¹ the Divisional Court (Rowlatt and McCardie JJ.) held that a contract between a firm of drapers and a commercial traveller, made after the outbreak of war, was dissolved when the traveller was called up under the Military Service Act, 1916 (or, to be precise, anticipated his call by joining the Royal Flying Corps four days earlier). 'The effect of his enlistment or of the Military Service Act, 1916, was to sweep away the basis of the arrangement between the parties', said McCardie J., citing a typical frustration case, *Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*² It would, we suggest, have sufficed for him to say that the Military Service Act, 1916, made performance of the contract unlawful, but, under the influence of the frustration cases, the learned judge added that 'a state of war is assumed to be of such prolonged duration as *prima facie* to put an end to contracts which are conditional upon the continuance of a particular state of things which is only consistent with peace'.³ He also pointed out that in *Nordman v. Rayner*,⁴ where he held that a contract of agency was not dissolved by internment, the *ratio decidendi* was that 'it was doubtful from first to last whether it would last for any substantial period'; in fact it lasted one month. On the other hand, in *Unger v. Preston Corporation*,⁵ where the internment of a 'friendly' refugee of enemy nationality, employed by the defendants as an assistant school medical officer, lasted for nine months, Cassels J. held that his contract of service was frustrated and dissolved by the fact, and at the date, of his internment, although it could not then be known that it would last for so long a period.

¹ [1917] 2 K.B. 87, 91, 92.

² [1916] 2 A.C. 397.

³ The Act did not say that it was illegal to be a commercial traveller. By converting a commercial traveller into a soldier it made him no longer available as a commercial traveller, and presumably it would be illegal to employ a deserter.

⁴ (1916) 33 T.L.R. 87; followed in *Schostall v. Johnson* (1919) 36 T.L.R. 75.

⁵ [1942] 1 All E.R. 200; see *Glanville Williams in Modern Law Review*, vol. 6 (1943), p. 160.

GUARANTEE

In addition to the common law prohibition of 'trading with the enemy',¹ we start with the general prohibition by the Trading with the Enemy Act, 1939 (section 1) of 'any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy', and we must consider the more particular prohibitions (section 1 (2) (a) (ii)) of paying money 'for the benefit of an enemy', and (section 1 (2) (a) (iii)) of performing 'any obligation to, or discharging any of, an enemy, whether the obligation was undertaken before or after the commencement of this Act'. So far as we are aware, guarantee or suretyship is nowhere prohibited *eo nomine*.

As a matter of principle, there are several ways in which war can affect the transaction: (i) when a relevant party becomes an enemy (which term we shall use in the territorial and substantially identical statutory² senses); (ii) when, no relevant party being or becoming an enemy, the transaction guaranteed involves illegal intercourse with the enemy; (iii) when, no relevant party being or becoming an enemy, the transaction is beneficial to the enemy or prejudicial to Great Britain by enhancing the resources of the enemy or diminishing those of this country; and (iv) when, no relevant party becoming an enemy, the outbreak of war frustrates a contract which is the subject of the guarantee.

The rights of a surety are in part the creation of equity, in part depend on quasi-contract, and are often supplemented by express contract, so that it may sometimes be more difficult to assess the impact of war upon them than in the ordinary case of contract, pure and simple. If we attempted to examine every aspect of guarantee, we should find that we were devoting to it an amount of space disproportionate to the actual incidence of the effect of war upon it.

Pre-war guarantee. Three parties require our attention—the creditor, the debtor³ and the surety (be it noted in passing that a surety may, consideration being present when his promise is not given by deed, guarantee a debt whether already incurred or still to be incurred).

¹ Above, p. 173.

² Above, p. 66.

³ The terms 'creditor' and 'debtor' are, of course, not confined to the case of a money debt and denote the two parties to an obligation in the wide sense, e.g. to deliver goods sold, to return a borrowed chattel, to serve a master faithfully, to perform faithfully the duties of an office, etc. It must be borne in mind that a guarantee is 'a collateral obligation, postulating the principal liability of another, the principal debtor' (Rowlatt, *Principal and Surety* (2nd ed. 1926), p. 1. References to this book do not mean that it deals with the effect of war).

(i) *Right of action on the guarantee already accrued.* If upon the outbreak of war a right of action has already accrued to a non-enemy surety against an enemy creditor 'to have his remedies exercised and his securities enforced against the principal [debtor]', or 'against [an enemy] principal debtor... to be indemnified and to have the remedies and securities of the creditor kept alive for that purpose',¹ the general principle already stated must apply: the right of action may be enforced if it can be, having regard to difficulties of service and other obstacles.² If it is the surety who is enemy, then in accordance with the principle already stated his rights of action are not destroyed but suspended until after the war.³

If a right of action has already accrued against an enemy surety to a non-enemy creditor or against a non-enemy surety to an enemy creditor, the same principles are applicable.

(ii) *No right of action on the contract of guarantee already accrued.* If on the outbreak of war no default by the debtor has taken place so that no right of action against the surety has accrued, it becomes necessary to consider what is the effect of the outbreak of war upon the obligation guaranteed, for the fate of the principal obligation guaranteed will affect, and may decide, the fate of the collateral obligation guaranteed. Let us consider some illustrations. (S=surety: D=principal debtor: C=principal creditor.)

(a) S guarantees the payment by D to C of the price of goods agreed to be sold and delivered to D. Upon the outbreak of a war which makes D an enemy the goods have not been delivered and the money is not due. The contract to sell the goods is abrogated, and the guarantee falls to the ground.

(b) S guarantees faithful service by D to C as C's resident agent in a foreign country. Upon the outbreak of a war which makes D an enemy, the contract of agency is abrogated, and the guarantee falls to the ground.

(c) S guarantees the manufacture of goods by D and the delivery of them by D to C for the agreed purpose of shipment to X in Germany. Upon the outbreak of war with Germany, neither D nor C becomes enemy, but the contract to manufacture and deliver is discharged by supervening illegality, and the guarantee falls to the ground.

(d) S guarantees the performance by D of a contract with C for laying out a dog-racing track and building a stand. Upon the outbreak

¹ Rowlatt, *op. cit.* p. 169. The position of co-sureties must be borne in mind, but I do not propose to complicate the matter by examining it.

² Above, pp. 101-105.

³ *Ibid.*

of war circumstances arise which have the effect of discharging this contract by the operation of the doctrine of frustration, and the guarantee falls to the ground.

(e) *S* is British, *C* is British or neutral, *D* is enemy. If the contract of guarantee cannot be carried out without involving *S* in intercourse with *D*, for instance, by enquiring as to the state of account between *C* and *D*, or without conferring a benefit upon *D*, it would appear that no action will lie upon the contract of guarantee until after the end of the war.¹

Suppose, however, that the outbreak of war does not abrogate the transaction guaranteed, it may nevertheless affect the guarantee.

(a) *S* guarantees the performance by *D* in favour of *C* of the covenants contained in a lease, including the payment of rent. The outbreak of a war makes *D* an enemy. The lease continues to be valid,² and likewise the guarantee.

(b) *S* or *C* becomes an enemy. It is submitted that the general rule relating to executory contracts will apply and that the contract of guarantee is abrogated.

(c) *S* becomes an enemy. The British debtor must pay the debt guaranteed and cannot plead that he is prohibited from doing so by section 1 (2) of the Act of 1939 because payment by him discharges the obligation of an enemy; that obligation is discharged not by the payment of the debt but by operation of law.

(d) *S*, a British corporation, before the outbreak of war against Italy, guaranteed payments to become due from an Italian corporation to a New York corporation for the purchase and shipment of aviation spirit from Mexico to Italy. The United States of America are still neutral. The contract guaranteed remains valid, but it is submitted that the guarantee is abrogated—at any rate so far as concerns enforcement in an English Court.

Judicial authority. The war decisions are few.

In *Seligman v. Eagle Insurance Co.*³ a British insurance company before the outbreak of war lent the sum of £2500 to a person who later became an enemy, upon the security of two life policies issued to him by the company and mortgaged to the company as security for the loan. At the same time, and as part of the same transaction, a surety guaranteed the payment of the loan and of the annual premiums; the enemy left

¹ *Stockholms Enskilda Bank Aktiebolag v. Schering Ltd.* [1941] 1 K.B. 424.

² *Halsey v. Esdaile* (*Leigh and Curzon Third Parties*) [1916] 2 K.B. 707.

³ [1917] 1 Ch. 519; see below, pp. 263, 264, 271, where this case is discussed in connexion with Life Insurance.

the country and failed to pay the premiums due; the surety tendered them to the company which accepted them subject to a reservation, and later the surety tendered the whole of the amount due on the loan and claimed from the company an assignment of the policies held by it to secure the loan to the enemy. Neville J. held that the payment by the surety of the premium and of the whole amount of the loan was unobjectionable and that he was entitled to an assignment of the policies. To the argument that these payments were payments for the benefit of the enemy, the learned judge's reply was that, the enemy's rights under the policy being suspended during the war, the enemy could not *while an enemy* benefit from the receipt of the premiums (or, *semble*, of the amount of the loan); 'what will result (he said)¹ is that perhaps some day somebody who is not an enemy alien may have a right to sue the company for the amount assured'. It was assumed throughout that the loan by the insurance company was not abrogated by the outbreak of war, and it was held by the learned judge that the policies, which of course contained covenants to pay the premiums, did not become void by the mere fact of the assured becoming an enemy.

The learned judge having held that no illegal intercourse with the enemy was involved in the receipt of the premiums, there remained the more difficult plea by the insurance company that the payments by the surety were payments on behalf of or for the benefit of an enemy and were within the mischief of the Trading with the Enemy Act, 1914, section 1 (2), the Proclamation of September 9, 1914, section 5 (5, 6 and 7), and the Trading with the Enemy Amendment Act, 1914, sections 2, 6 (1) and 10. It should, however, be noted that none of these provisions expressly prohibited the discharge of any obligation of an enemy, as section 1 (2) (a) (iii) of the Act of 1939 does, and that is essentially what a surety does when he pays the creditor under his guarantee; it is true that the debtor's obligation to the surety remains but his obligation to his creditor is discharged, and it cannot be assumed that the two obligations, though identical as to the sum of money involved, are identical in their burden.

In *R. & A. Kohnstamm, Ltd. v. Ludwig Krumm (London), Ltd.*² (principal debtor enemy, principal creditor and surety British), there was what Macnaghten J. described as 'a perfectly plain guarantee' (entered into before the outbreak of the present war) by the defendants of any debt that a German company carrying on business in Germany might owe to the plaintiffs for goods supplied. The plaintiffs having sued the defendants shortly after the outbreak of war for the amount

¹ At p. 526.

² [1940] 2 K.B. 359.

then due by the German company to the plaintiffs, the defendants objected that by paying the debt which they had guaranteed they would commit an offence under section 1, subsection 2 (a) (iii) of the Trading with the Enemy Act, 1939.¹ Macnaghten J., however, held that the words of the Act 'mean a complete discharge', and do not cover the case where the effect of the payment by a surety is merely to convert the enemy's obligation from an obligation to pay the principal creditor into an obligation to pay the surety.² He pointed out the absurdity which would arise in the case before him, namely, that the principal creditor was permitted by the provisions of proviso (ii) to section 1 (2) of the Act to receive payment of the debt directly from the enemy and yet would not be permitted to receive payment from the surety. Note that in this case both surety and principal creditor were British, so that the effect of payment under the guarantee was to convert the enemy debtor's obligation from a debt owed to one British corporation into a debt owed to another—neither of them likely to be recoverable during the war.

We then come to the decision of the Court of Appeal in *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.*³ (principal debtor enemy, principal creditor neutral, surety British). This is anything but a case of 'a perfectly plain guarantee' and relates to a highly complicated financial transaction, described as a 'contract of debt' whereby the British surety was both a guarantor of the debt and a purchaser of it by instalments. The principal matter for decision was whether or not a payment by the British surety was a payment 'for the benefit of an enemy' under the Trading with the Enemy Act, 1939, section 1 (2). The Court of Appeal held that a payment by the British surety to the neutral creditor which had the effect of preserving to the enemy debtor a substantial discount and of substituting for an obligation from it to a neutral company a more problematical obligation to a British company, which was unlikely to be able to enforce it during the war, was a payment 'for the benefit of an enemy' and also discharged the obligation of an enemy, and therefore could not be enforced. It is not stated that the 'contract of debt' and of guarantee was regarded as abrogated upon the outbreak of war or the enactment of the Trading with the Enemy Act, 1939, and the Court was not called upon to decide that question.⁴ There were special circumstances

¹ See above, p. 175.

² And see comment in 56 L.Q.R. (1940) at p. 436.

³ [1941] 1 K.B. 424, already referred to above, p. 211. See also *Weiner v. Central Fund for German Jewry* [1941] 2 All E.R. 29.

⁴ So held in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* [1944] Ch. 13.

which enabled the Court of Appeal to distinguish the *Kohnstamm* decision.

In later proceedings¹ upon the same complicated transaction the British surety raised the issue referred to above as left open, namely, the effect of the outbreak of war upon the continued validity of the main contract, partly a guarantee and partly a purchase of a debt by instalments. The whole transaction received an exhaustive analysis from Simonds J., the Court of Appeal and the House of Lords, where it was held by a majority (Lord Thankerton, Lord Porter and Lord Goddard, with Lord Russell of Killowen and Lord Macmillan dissenting) that, as at the time of the outbreak of war the neutral principal creditor (the Stockholm bank) had wholly performed its obligations towards the enemy debtor and nothing remained to be done as between the British surety and the Stockholm bank but the payment by the former to the latter of certain instalments of money remaining due and the corresponding assignments of debt by the latter to the former, the British surety was not entitled to a declaration that the main contract was abrogated. Lord Porter and Lord Goddard further held that the outstanding obligations and the right to enforce them were merely suspended until such time as these things could be done without conferring a benefit upon the enemy, but it does not appear that this opinion was essential to the decision.

The transaction in question was a very special and a very complicated one, and the members of the House of Lords differed not so much as to the law but in its application to the exceptional circumstances of the transaction and more particularly on the question whether upon the outbreak of war the Stockholm bank held an accrued right to certain liquidated sums of money and was under no obligation to do anything further. That seems to turn on the question whether the main contract is construed *au pied de la lettre* or whether its substance only is looked at, so that the obligation of the Stockholm bank to assign to the British surety the instalments of the debt owed to the former by the German company may be ignored.

It is suggested that two conclusions of law of a general character may be drawn;

(i) that in considering the effect of the outbreak of war upon a contract between a person in this country and an enemy which is not wholly performed attention should be focused not so much upon the original obligations under the contract as upon its obligations still outstanding: upon them the general effect (apart from the special case of concomitants of the rights of property such as shares in a company) will be abrogation except where there has accrued to the enemy a mere right to the payment of a liquidated sum of money: this right is only suspended and he can enforce it when the war is over: such an accrued right held by a non-enemy is not even suspended;

(ii) a contract between a person in British territory and a person in neutral (or *semble* British) territory will be abrogated by the outbreak of war if (a) the performance or further performance of its obligations involves the person in British territory in intercourse with an enemy as in *Esposito v. Bowden*,² or (b) if, without involving any such intercourse, its performance or further performance during the war would confer a benefit upon an enemy, except that if either party has on the outbreak of war acquired an accrued right to the payment of a liquidated sum of money payment of which would result in a benefit to an enemy, the right is not abrogated but its enforcement is suspended until after the war.

It is believed that (ii) (b) is new (and possibly not necessary to the decision) in suspending the right of action of one who is not an enemy. However just the result may be, it is not easy to find a juridical basis for the suspension; in the case of an enemy's right of action the basis of suspension is believed to be the personal bar arising from the plea of alien enemy: see above, p. 104.

¹ *Schering Ltd. v. Stockholms Enskilda Bank* [1944] Ch. 13 and [1946] A.C. 219.

² *Supra*, p. 90.

Guarantee which it is attempted to make during the war. Principle demands that no valid contract of guarantee can be made during a war if any of the parties is an enemy or if it involves illegal intercourse with the enemy or if it is beneficial to the enemy or detrimental to Great Britain.

CHAPTER 13

INSURANCE¹

- I. Insurance of Property.
- II. Life Insurance.
- III. Foreign Proceedings against British Insurance Companies.

I. INSURANCE OF PROPERTY

A. PRE-WAR MARINE INSURANCES WHERE ONE PARTY BECOMES AN ENEMY IN THE TERRITORIAL SENSE²

(i) *Historical.* Before and during the Napoleonic Wars, that is, before the law relating to trading with the enemy had hardened and the effect of war upon contracts had crystallized out into certain principles, there existed in regard to contracts of insurance what appears to us to-day, being wise after the event, a certain confusion of thought. It may help us to understand the present law if we try to clear up this confusion.

The period before 1802-1803. This period is under the influence of standards of opinion on the subject of trading with the enemy which to-day would be regarded as very lax. Lord Mansfield was one of the foremost exponents of the essentially mercantilist point of view. 'If we don't trade with them, neutrals will. Why should not our merchants get the benefit?' Fifoot³ quotes a speech made by Lord Mansfield as Solicitor-General in 1747, when opposing a Bill to 'prevent the insurance of French ships and their loading during the war with France'. He warned the House of Commons that the effect of the Bill would be 'to transfer to the French a branch of trade which we now enjoy without a rival. . . . Not only the nations we are in amity with, but even our enemies, the French and Spaniards, transact most of their business here at London.' The French writer Valin pointed out⁴ that the effect of allowing British underwriters to insure enemies against capture by British forces was that one part of the British nation restored to the French by the effect of insurances what the other part took from the French by the rights of war.

¹ The Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland (Cmd. 7022) contain provisions relating to Insurance.

² Referred to in this chapter simply as an 'enemy'.

³ *Lord Mansfield* (1936), p. 83, quoting from Holliday's *Life of Lord Mansfield*, pp. 90-97.

⁴ Tit. vi, *Des Assurances*, art. 3, p. 215, cited by Arnould, *Marine Insurance*, § 85.

Lord Mansfield as a judge appears to have retained the view which he advocated as Sir William Murray, and strongly discouraged the raising of the defence that such insurances were illegal,¹ and it was not until the judgment of the Court of Common Pleas in *Furtado v. Rogers*² was delivered by Lord Alvanley in 1802 that it was established that a pre-war policy of insurance, whereby a British insurer undertook to indemnify a foreign shipowner against the loss of his ship by British capture, was abrogated upon the outbreak of a war which made the shipowner an enemy. This judgment was followed and adopted in the year 1803 by Lord Ellenborough C.J. in delivering the judgments of the Court of King's Bench in *Kellner v. Le Mesurier*³ (enemy shipowner—insurance effected during the war) and *Gamba v. Le Mesurier*⁴ (enemy shipowner—pre-war insurance). In 1803 this rule was in effect extended, in *Brandon v. Curling*,⁵ to insurance against capture by a co-belligerent with Great Britain, though, that circumstance not being stated in the case submitted to the King's Bench, it was apparently not considered to be open to the Court to rest their judgment specifically upon capture by a co-belligerent and it is based on more general grounds. Meanwhile substantially the same result had been reached by means of the operation of the plea of alien enemy in *Brandon v. Nesbitt*⁶ in 1794. There an insurance upon cargo was effected before the outbreak of war by a British agent on behalf of French owners who became enemies upon the outbreak of war. The ship (American) and cargo were captured as prize (apparently by Great Britain). When the British agent sued the underwriters, his action was defeated, upon the ground, not that an insurance against British capture was illegal, but that 'an action will not lie either by or in favour of an alien enemy'. In *Flindt v. Waters*⁷ Lord Ellenborough C.J. approved this decision and said, 'the point there decided was that the fact of the parties interested in the insurance having become alien enemies before the loss happened might be pleaded to an action brought in the name of the British agent who effected the insurance'. In *Flindt v. Waters* 'the insurance, the loss,

¹ See Lord Alvanley C.J. in *Furtado v. Rogers* (1802) 3 Bos. & P. 191, 197, 199, and the remarks of Buller J. in *Bell v. Gilson* (1798) 1 Bos. & P. 345, 354, upon Lord Mansfield's attitude, and of Lord Ellenborough C.J. in *Kellner v. Le Mesurier* (1803) 4 East 396, 403. A kind of gentleman's agreement appears to have existed in the insurance market that the fatal defence should not be raised, and no doubt the great weight of Lord Mansfield's opinion survived him for a time. It is a little like the understanding that underwriters will not plead the defence that the policy is a P.P.I. policy and therefore unenforceable except in a case where they have a very well-founded suspicion that the plaintiff is a 'wrong 'un'.

² *Supra*.

³ 4 East 396.

⁴ *Ibid.* 407; see also *Ex parte Lee* (1806) 13 Ves. Jun. 64.

⁵ 4 East 410.

⁶ 6 T.R. 23.

⁷ (1812) 15 East 260, 265, 266.

and cause of action had arisen before the assured had become alien enemies: when therefore they became such, it was only a temporary suspense [*sic*] of their own right of suit in the Courts here, as alien enemies; but that objection cannot be carried further, nor applied to the plaintiff as their trustee, who is a subject of the King: otherwise, if it could avail upon this plea, it would be making a perpetual which in its nature is only a temporary bar'. The remarks of Rowlatt J. in *Schmitz v. Van der Veen & Co.*¹ require notice; he points out the necessity of distinguishing two cases, the first, 'that where the cause of action is unexceptionable, but the plaintiff as an alien enemy is temporarily and personally incapable of being received as a plaintiff' [action to recover pre-war loss], and the second, 'that where the cause of action, whoever puts it forward, fails in itself, and fails finally'.

The period since 1802-1803. The second stage is reached when it is realized and enunciated, as it was *obiter* in 1803 in *Brandon v. Curling*,² that, quite apart from capture by Great Britain and her allies, every insurance of enemy property is contrary to the public interest and a loss occurring during the war cannot be recovered. There Lord Ellenborough C.J. said:

'Where the insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrafted therein, viz.: "Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer."' Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other.'

Thus the earlier distinction (if indeed it ever had a sound legal basis) between the insurance of enemy property against British (and allied) capture on the one hand and its insurance generally on the other, disappeared, and all pre-war insurances of enemy property by persons in this country were dissolved as from the outbreak of war. Accordingly, in *Ingle v. Mannheim Insurance Co.*³ where there was a loss during the war upon a pre-war policy of marine insurance, the defendant company argued that 'a contract cannot be carried out if it involves intercourse with the enemy', and (unsuccessfully) that its London branch office which issued the policy was an enemy,⁴ whereas the plaintiffs

¹ (1915) 84 L.J. K.B. 861, 864.

² *Supra*. (Pre-war policy—French cargo—capture by Spain.)

³ [1915] 1 K.B. 227.

⁴ If it had been enemy, surely the outbreak of war would have abrogated the policy.

contended with success that it was not. Conversely, in *Theodor Schneider & Co. v. Burgett and Newsam*¹ Scrutton J., and the Court of Appeal, had no hesitation in holding that a pre-war contract of marine insurance whereby the goods of a British company were insured with a German insurer was abrogated upon the outbreak of war (no claim had accrued upon the policy). It is significant that Scrutton J. dealt with the two contracts involved—affreightment with a German shipowner and insurance with a German insurer—together and upon precisely the same lines and regarded the cause of abrogation in both cases to be the same, namely, that they involved trading or further trading with the enemy and therefore fell within the principles laid down in *Potts v. Bell*² and *Esposito v. Bowden*.³

The strange thing is that it should have been considered necessary, at any time since 1802, to resort to arguments peculiar to insurance, namely, the folly of indemnifying the enemy against losses resulting from British and allied belligerent action, when there lay ready to hand a principle of general application, namely, that all commercial intercourse with the enemy is illegal. Lord Alvanley C.J. in *Furtado v. Rogers* invoked this principle but seemed to regard it as less important than the reason based on indemnity against British capture.

Even in 1914 this ghost was not yet completely laid, and the first Trading with the Enemy Proclamation, dated August 5, contained the following prohibition:

‘Not to make or enter into any new marine, life, fire, or other policy or contract of insurance with or for the benefit of any person resident, carrying on business, or being in the said [German] Empire, nor under any existing policy or contract of insurance to make any payment to or for the benefit of any such person *in respect of any loss due to the belligerent action of His Majesty’s forces or those of any ally of His Majesty.*’ [Italics ours.]

This Proclamation was revoked by the Proclamation of September 9, 1914, the corresponding clause in which—paragraph 5 (6)—omitted all reference to the consequences of belligerent action. *Requiescat in pace!*

It is submitted that the following conclusions are justified:

(a) A pre-war contract of marine insurance between a British subject and an enemy in the territorial sense is abrogated on the outbreak

¹ [1915] 2 K.B. 379; [1916] 1 K.B. 495 (C.A.).

² (1800) 8 T.R. 548.

³ (1857) 7 El. & Bl. 763.

of war, whether the British subject or the other party is the insurer and whether the premium has already been paid or not¹ (we shall deal later with non-marine insurance).

(b) This rule is not confined to insurance upon commercial property, e.g. merchant ships and cargoes, but extends to all property, and is not confined to insurances against the consequences of British or allied belligerent action.²

(ii) After these preliminary remarks we can address ourselves to *losses happening and claims accruing before the outbreak of war.*

Harman v. Kingston,³ *Flindt v. Waters*⁴ and *Janson v. Driefontein Consolidated Mines*⁵ shew that where a loss has occurred and a right of action upon the policy has accrued to an enemy before the outbreak of war, his right of action is not destroyed but merely suspended until after the war.⁶ In the last-named case Lord Lindley quoted with approval the following passage from Arnould:⁷

'Where the party intended to be insured by the policy does not become an alien enemy until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities and revives on the restoration of peace.'⁸

In the cases mentioned above it was the assured who became an

¹ The premium is presumably a debt: see above, p. 101.

² Pennant in 18 L.Q.R. (1902), pp. 289-296 ('Insurances of Enemies' Property') would not accept this last sentence and holds the view that a pre-war insurance by a British company of an enemy's property is only illegal and void in so far as it relates to property which it is the aim of the British Government to destroy by belligerent action, i.e. 'if it would indemnify the enemy against a loss which the British Government intended him to undergo' (p. 293). We do not see how he can reconcile this view with such cases as *Furtado v. Rogers* and *Espósito v. Bowden*, which enunciate quite general principles.

³ (1811) 3 Camp. 150, where Lord Ellenborough C.J. said, in a case upon a policy of marine insurance, 'the fact of the persons interested [on whose behalf, it seems, the plaintiffs were suing] having become alien enemies since the loss, only goes to suspend the remedy, and ought not to have been pleaded in abatement'. The cause of the loss does not appear.

⁴ (1812) 15 East 260.
⁵ [1902] A.C. 484. (But it is very unlikely that a British underwriter will again be allowed to waive the plea of alien enemy so as to enable an enemy assured to sue during the war.) See also *Robinson Gold Mining Co. v. Alliance Insurance Co.* [1904] A.C. 359.

⁶ In the Wars of 1914 to 1918 and 1939 to 1945 steps would probably be taken to vest it in the Custodian of Enemy Property.

⁷ *Marine Insurance* (6th ed.), i, p. 135.

⁸ Provided, of course, that the British underwriter is not released from payment by the Treaty of Peace and ensuing legislation. For a summary of the provisions of the Peace Treaties of 1919-1920 upon contracts of marine insurance, see Arnould, *op. cit.* (12th ed.) i, p. 126 (note r).

enemy. In *Robinson & Co. v. Continental Insurance Co. of Mannheim*¹ it was the insurance company who became the enemy,² and Bailhache J. held that the British assured could sue the company for a pre-war loss during the war.

Actions to recover premiums are rare, and in many policies the receipt of the premium is acknowledged whether it has been paid or not; but if a British assured owed a premium to a foreign insurer upon the outbreak of a war which made the latter an enemy, the right to sue for the premium would be suspended until after the war.

Harman v. Kingston, *Flindt v. Waters* and *Janson v. Driefontein Consolidated Mines* do not lay down a rule peculiar to insurance. We have already noticed authority for the same rule in *Ex parte Boussmaker*,³ *Ertel Bieber & Co. v. Rio Tinto Co.*,⁴ and *Zinc Corporation v. Hirsch*.⁵ *Janson v. Driefontein Consolidated Mines* deserves notice on two further points: (a) that a British underwriter is not likely in these sterner days to be allowed to waive the plea of alien enemy so as to enable an enemy assured to sue him during the war for a pre-war loss; and (b) that war is war and not merely strained relations and it is for the Executive to tell us (and the Courts) when His Majesty is at war.⁶ *Nigel Gold Mining Co. v. Hoade*⁷ also requires consideration. The plaintiff company had been registered in Natal in 1888 and had subsequently received a 'supplemental incorporation' in the Transvaal. It was working a gold mine situated in the territory of the Transvaal Republic. Before the South African War it had effected an insurance with the defendant, a Lloyd's underwriter, upon the products of its mine against (*inter alia*) 'arrests, restraints, and detainments of all kings, princes and people'. A few days after the outbreak of war the enemy Government seized and carried away certain gold products from the plaintiff company's mine. The mine was closed upon the outbreak of war and there was no evidence of intention to carry on mining operations during the war. Mathew J. declined to invest the plaintiff company with

¹ [1915] 1 K.B. 155.

² Or at any rate was treated as an enemy, for it does not appear whether the policy was effected with the head office in Mannheim or with the London branch, which in *Ingle v. Mannheim Insurance Co.* [1915] 1 K.B. 227 (the same company) was regarded as not being an enemy at common law; in that case the claim accrued after the outbreak of war and the action was allowed to proceed. The Proclamation of September 9, 1914, merely confirmed the common law status of the London branch and the Proclamation of October 8, 1914, had not retrospective application.

³ (1806) 13 Ves. Jun. 71.

⁴ [1918] A.C. 260, 269.

⁵ [1916] 1 K.B. 541, 556.

⁷ [1901] 2 K.B. 849.

⁶ Above, chapter 1.

enemy character or to treat their property as enemy property and allowed them to recover their loss on the policy.

We have stated that an underwriter may, apart from any provision to the contrary which may be embodied in the Treaty of Peace, pay to an enemy after the war losses which accrued before the war, though in most cases he will probably be found to have paid them during the war to the Custodian of Enemy Property.¹ It is, however, worth noting that before the War of 1914 to 1918 it was the public and avowed intention of Lloyd's underwriters, and also of most of the companies, to waive the plea of alien enemy and hold themselves subject to an honourable obligation to pay to enemies *during* the war losses which accrued *before or during* the war. The avowal, so far as Lloyd's is concerned, is contained in a statement made by the then Chairman of Lloyd's at the International Conference on maritime law at Copenhagen on May 16, 1913.² This honourable undertaking which was made in the fullest good faith was (it is submitted) based on a misconception in the minds of the underwriters' advisers as to the nature of the plea of alien enemy and the prohibition of intercourse with enemies. These rules, now at any rate, rest on public policy and not on the protection of the British subject so as to be waivable at his option, and it would be illegal, even apart from the express provisions of the Trading with the Enemy Act, 1939, to carry out such an undertaking. The blame for the prevalence of such views, which remind one of Lord Mansfield's comment above quoted,³ must be laid at the door of the House of Lords, who in *Janson's* case⁴ ought not to have condoned the action of the underwriters sued by an enemy plaintiff during war in waiving the plea of alien enemy and permitting themselves to be sued. The fact that the war was over when the case reached the House of Lords should (it is submitted) have made no difference, and the case should have been stopped.

Even after the conclusion of peace, the underwriter cannot be compelled to pay to those who were enemies losses upon pre-war policies which accrued *during* the war.

(iii) *Dissolution of the contract.* Apart from losses which have already happened and claims which have already accrued, the effect of the out-

¹ During the War of 1939 to 1945 in practice British debtors were bound merely to register with the Custodian debts owing to enemies who may be described as 'friendly' enemies, e.g. a Dutchman in Holland, whereas they had to pay to the Custodian debts due to real enemies.

² Printed as an Appendix to the first edition of this book.

³ Above, p. 239.

⁴ [1902] A.C. 484.

break of war is to dissolve a contract of insurance with an enemy as from that time. The reason is that the contract belongs to the class of contracts which involve intercourse with the enemy. Any particular contract might not; the premium may have been paid before the war broke out, no loss may occur and no occasion for the assured to communicate with his underwriters. Those considerations are irrelevant. It is the class of contract that matters.¹ Moreover, it is safe to say, upon the analogy of the cases upon long-term contracts for the sale of goods and upon time charters,² that, although the duration of a policy upon enemy property may in terms extend beyond the period of a short war, yet it is dissolved and will not revive after the war.

It is difficult to see how the doctrine of frustration could operate so as to dissolve any contract of insurance, whether of property or of life; for insurance involves the payment of money and, to quote again Pollock's citation from Savigny: 'there is plenty of money in the world and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay.'³

B. PRE-WAR MARINE INSURANCES WHERE NEITHER PARTY BECOMES AN ENEMY IN THE TERRITORIAL SENSE

This contract, like any other, is dissolved upon the outbreak of war by reason of illegality if in itself it involves intercourse with the enemy, or if it is ancillary to a transaction involving intercourse with the enemy or is otherwise detrimental to the interests of this country.

(i) *Involving intercourse with the enemy.* This factor is not likely to occur except in the case where the insurer or the assured is an enemy, and that case has already been considered. It is, however, possible to imagine circumstances in which it might occur; for instance, where the broker effecting the insurance becomes an enemy and further communication with him after the outbreak of war might be involved.

(ii) *Upon illegal trading with the enemy.* One of the commonest causes of dissolution occurs when the insurance covers property involved in unlicensed trading with the enemy. There is no doubt since *The Panariellos*⁴ that the contract is also dissolved when the property covered and involved in trading with the enemy belongs to the nationals of an allied Power which is co-belligerent with Great Britain.

¹ Above, p. 83.

² E.g. *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. 260; *Clapham Steamship Co. v. Handels-en-Transport Maatschappij Vulcaan* [1917] 2 K.B. 639.

³ Above, p. 135.

⁴ (1915) 31 T.L.R. 326; (1916) 32 T.L.R. 459 (J.C.).

(iii) *Upon licensed trading with the enemy.* The effect of a licence granted to a British or an enemy subject permitting trading with the enemy legalizes not only the trading transaction but ancillary contracts such as affreightment and insurance.¹

(iv) *Indemnity against the consequences of carriage of contraband, blockade-running and other unneutral service.* The case of insurances upon the property of neutral subjects requires more detailed consideration. Aid rendered by neutral subjects to a belligerent in the form of carriage of contraband, blockade-running or other 'unneutral service' (as it is called in the unratified Declaration of London) is not regarded as illegal by the municipal law of England, though the British Government recognizes the right of a belligerent to protect himself against these practices by the capture and condemnation of ships and cargoes involved in them.

Great Britain a neutral. Thus, when Great Britain is a neutral, insurances (effected either before or during the war) by British insurers upon such ventures, whether undertaken by British subjects or others, are not illegal,² though the outbreak of war, or some development of the war, may, by converting a peaceful voyage into a blockade-running expedition or an innocent cargo into a contraband one, affect the continued validity of the policy; that is a question of its terms and of the circumstances which attended its making. The question of concealment may easily arise upon such policies.

Great Britain a belligerent. When, however, Great Britain is a belligerent, a different attitude towards the activities of neutral subjects must be adopted. Their property involved in attempts to aid or supply Great Britain is lawfully insurable by British insurers; if involved in attempts to aid or supply the enemy, it is not. On grounds of general principle it is inconceivable that a British underwriter should be allowed to pay in the latter case, whether the policy was issued before or during the war, and thus indemnify a neutral subject—whether the loss or damage arises from British capture or perils of the seas—in respect of property involved in succouring Great Britain's enemy. Such a contract would, in the words of Lord Alvanley C.J.,³ be a 'contract to do [something] which may be detrimental to the interests of his own

¹ Above, p. 182 and below, p. 249.

² *Hobbs v. Henning* (1864) 17 C.B. (N.S.) 791 (where the ship was the 'Peterhoff' which gave her name to one of the leading American prize decisions of the Civil War); *Seymour v. London & Provincial Marine* (1872) 41 L.J. C.P. 193 ('warranted no contraband of war').

³ In *Furtado v. Rogers* (1802) 3 Bos. & P. 191, 198.

country'. It is just as absurd to indemnify a neutral subject as an enemy subject against the consequences of British capture.¹

Suppose, however, that before or during the recent war a British insurance company had issued to a firm in a country which remained neutral a policy which included war risks generally, and the proper law of the contract was the law of the neutral country because, for instance, the policy was either issued by a branch in the neutral country or, if issued in England, contained a clause accepting the neutral country's law and jurisdiction, and a loss arose owing to British capture, what is the position of the assured? That he cannot recover in England is shewn by *Dynamit Actien-Gesellschaft v. Rio Tinto Co.*² Can he recover in the neutral country?³ An answer to this question depends on the law of the neutral country, and it would not be in the least surprising to find judgment being given against the British company, provided that the municipal law of the country contained no specific provision (as, for instance, the law of the United States did for a time) making such ventures as the carriage of contraband or breach of blockade illegal and provided that there was no concealment. A judgment could be enforced against the assets of the British company in the neutral country, but it seems probable that the judgment—being based upon an insurance against the consequences of British capture—could not be enforced in this country.⁴

There is no objection to a policy of insurance issued before or during the war by a British subject to cover the property of a British subject against loss or damage resulting from enemy action or from action taken to avert or minimize enemy action, provided that the property is not involved in trading with the enemy. Nor is there any objection

¹ Arthur Cohen, K.C., a very considerable authority on marine insurance, expressed the view in Halsbury, *Laws of England*, xvii, § 844, that 'as a general rule, whenever any property is according to prize law as administered by the courts of this country liable to British capture, the insurance in this country on such property [query, against any risks] is illegal and void'. See Hailsham, xviii, § 412.

² [1918] A.C. 260, 292, 294.

³ Arnould, *Marine Insurance* (12th ed. 1939), § 765, states that such a loss could be recovered in a neutral country against a neutral insurer.

⁴ The Exception to Dicey's Rule 114 suggests that the foreign judgment would not be enforceable here. We are aware of no clear authority. It is worth mentioning that under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, one of the grounds upon which the registration of the foreign judgment must be set aside is that its enforcement would be contrary to public policy in England. The analogy of *Dynamit Actien-Gesellschaft v. Rio Tinto Co.* [1918] A.C. 260, 292, 294, may be invoked. If 'it is illegal for a British subject to become bound [by the interpretation placed upon his admittedly foreign contract by foreign law] in a manner which sins against the public policy of the King's realm', it is arguable that a foreign judgment should be exposed to the same defence. See below, pp. 275-278.

to such an insurance upon the property of the subject of a neutral State, provided that it is not involved in the carriage of contraband to Great Britain's enemy or the breach of a British blockade or in some other activity hostile to Great Britain.

C. CONTRACTS OF MARINE INSURANCE EFFECTED DURING THE WAR

Except by licence of the Crown, express or implied, no valid contract of insurance can be made during the war between a person in this country and an enemy in the territorial sense, whichever of them may be insurer or assured.

This rule results from general principle but was only established on a firm foundation in the year 1800 by the judgment of the Court of King's Bench in *Potts v. Bell*,¹ a decision of great importance, for Park J. in *Willison v. Patteson*² said of it: 'Before the case of *Potts v. Bell*, there was an opinion prevalent in Westminster Hall, that the commerce with an enemy was not illegal.' In *Potts v. Bell* the plaintiffs, who insured their interest in the goods, were British merchants carrying on business in London; the policy on ship and goods was subscribed in London by the defendant (apparently British) and was dated December 7, 1797; the ship was Prussian (neutral); but the voyage, which began on December 18, was from Rotterdam, an enemy port, to Hull, and thus involved trading with the enemy, for Great Britain and Holland (under a puppet Francophile Government) were at war; the loss was due to capture by a French enemy ship. The plaintiff failed to recover on the policy, and the reason given in a regrettably terse judgment³ is that 'it might now be taken that it was a principle of the common law that trading with an enemy without the King's licence, was illegal in British subjects'. Counsel for the successful defendant contended that the policy was 'void', that is, void *ab initio*.

Moreover, the premium paid in respect of an insurance which is void *ab initio* by reason of this kind of illegality cannot be recovered back from the underwriter.⁴

An express licence to insure enemy property or to effect an insurance with an enemy is rarely, if ever, granted. But when the Crown licenses a particular trading transaction or a particular kind of trade with the enemy, or trading generally with him, it thereby licenses by implication the contracts usually ancillary to the main contract, e.g. insurance

¹ (1800) 8 T.R. 548.

² (1817) 7 Taunt. 439, 449.

³ The arguments are valuable and are fully reported.

⁴ *Vandyck v. Hewitt* (1800) 1 East 96.

and affreightment. Thus in *Usparicha v. Noble*,¹ a Spaniard resident in this country during war between Great Britain, on the one hand, and France and Spain, as co-belligerents on the other hand, was licensed by the Crown to ship goods by a (neutral) Prussian vessel from this country to Spain and insured the goods with the defendant, who was apparently a British underwriter; it was agreed at the time of the action that the plaintiff had shipped the goods on account of correspondents who were residing in enemy territory and not on his own account; the goods were lost owing to capture by a French privateer, a loss covered by the policy; the plaintiff recovered upon the policy, for 'The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end'.²

We must now mention briefly three groups of cases which do not illustrate the impact of war upon the general principles of the law of marine insurance so much as the interpretation of certain expressions of frequent occurrence in policies.

D. THE EFFECT OF WAR IN PRODUCING A FRUSTRATION OF THE VOYAGE OR ADVENTURE³

The decision of the judge of first instance, Bailhache J., in *British and Foreign Marine Insurance Co. v. Sanday*,⁴ probably caused more consternation in the limited community which it affected than any other decision during the War of 1914 to 1918 gave rise to in that or any other section of the mercantile community. The plaintiffs were the

¹ (1811) 13 East. 332.

² At p. 341.

³ For a case upon the effect of war in producing a constructive total loss, see *Polarian Steamship Co. v. Young* [1915] 1 K.B. 922 (C.A.). The suggestion made by Bailhache J. *obiter* in *Mitsui v. Mumford* [1915] 2 K.B. 27 (timber in Antwerp on the outbreak of war in August 1914) that the doctrine of constructive total loss is not confined to marine insurance and that an analogous principle (minus notice of abandonment) applies to an insurance upon goods on land, appears to have influenced Bray J. in *Campbell & Phillips v. Denman* (1915) 21 Com. Cas. 357 (also goods in Antwerp in August 1914). This suggestion was disapproved by Lord Atkinson in delivering the judgment of the House of Lords in *Moore v. Evans* [1918] A.C. 185, where incidentally he pointed out (at p. 194) that the doctrine of constructive total loss based upon notice of abandonment had its origin in cases of capture. In *Moore v. Evans* it was held that a non-marine policy for twelve months issued in January 1914, to a firm of London jewellers on pearls in Brussels and Frankfort-on-Main against 'loss of and/or damage or misfortune to' the goods was a policy on goods and not on an adventure, so that the mere fact that as a result of the outbreak of war they were unable to recover possession of their pearls did not constitute a loss upon the policy, there being no evidence that the jewellery had not remained in the possession of the consignees in Brussels and Frankfort or their bankers.

⁴ [1915] 2 K.B. 781 (decisions of Bailhache J. and Court of Appeal); affirmed [1916] 1 A.C. 650.

British owners of cargo laden on board two British vessels on the high seas upon the outbreak of the War of 1914 to 1918 and consigned to Hamburg. One vessel on August 9 was stopped by a French cruiser and told to go to Falmouth for security; the other, in response to a pre-war suggestion from the Admiralty, was on August 7 diverted by her owners to a British port. The plaintiffs warehoused the goods and on September 7 gave notice of abandonment and claimed for a constructive total loss. The usual F.C. and S. clause had been deleted in consideration of an extra premium, and the material perils insured against in the body of the policy were 'takings at sea, arrests, restraints, and detentions of all kings, princes and people of what nation, condition, or quality soever'. The first point taken by and decided against the underwriters was that the Marine Insurance Act, 1906, had not abrogated the old rule that: 'Upon an insurance on goods . . . the frustration of the adventure by an insured peril is a loss recoverable against underwriters, though the goods themselves are safe and sound.'¹

There was nothing startling about that. The 'subject-matter' of an insurance of goods from *A* to *B* is not merely the physical existence of the goods but their transportation and safe arrival.

But upon the second question—whether the loss was by a peril insured against—it was contended by the underwriters (a) that the restraint clause in the policy must be taken not to include restraints, or at any rate proper and legal restraints, by the British Government, and (b) that even if the 'municipal law of this country and the authoritative acts of the British Government' were covered, restraint connoted the actual use of physical force and did not comprise mere voluntary compliance with the law of the country or the commands of the Government.²

Bailhache J., in a judgment which was affirmed by the Court of Appeal (Swinfen Eady L.J. dissenting) and by the House of Lords unanimously, held (a) that the proximate cause of the loss was a restraint of princes which 'took the form of the common law, which upon the outbreak of war sprang automatically into force, and of the commands issued by proclamation',³ namely, not to navigate a ship or carry goods to a German port; and (b) that the restraints clause included restraints by the British Government. Upon (a) Earl Loreburn remarked that he was 'not pressed by the circumstance that force was neither exerted

¹ [1916] 1 A.C. at p. 656.

² The case of an illegal or *ultra vires* requisition by the British Government was considered by Bailhache J. in *Russian Bank for Foreign Trade v. Excess Insurance Co.* [1918] 2 K.B. 123; [1919] 1 K.B. 39 (C.A.).

³ [1915] 2 K.B. at p. 789.

nor present, for force is in reserve behind every State command';¹ and in a later case² Lord Sumner pointed out that the ground of the decision in *Sanday's* case was 'the illegality of any further prosecution of the voyage, both ship and master being British'. Upon (b) the authority for including restraints by the British Government rested almost entirely upon the works of Marshall, Phillips and Arnould, but no authority was necessary, for the words of the clause clearly included the British Government, unless some more limited meaning could be given to it by custom or was demanded by some rule of public policy.³

The effect of the judgment in *Sanday's* case was to produce a considerable amount of surprise in the marine insurance community. It had never been decided, and it had probably never before entered the head of a broker or underwriter, that British restraints were included in the ordinary restraints clause in the body of the policy; such a decision upon so venerable a document was equivalent to laying hands upon the ark of the covenant of marine insurance. The ocean suddenly became dense with constructive total losses, and Lloyd's underwriters quickly devised the following clause:

BRITISH AND ALLIES CAPTURE CLAUSE, 1916

Warranted free of any claim arising from capture, seizure, arrest, restraint or detainment, except by the enemies of Great Britain or by the enemies of the country to which the assured or the ship belongs.

In 1919 this clause was superseded by one of a more permanent character as follows:

'Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure, caused by arrests, restraints, or detainments of kings, princes or peoples.'⁴

¹ [1916] 1 A.C. at p. 659; and see Lord Wright in *Rickards v. Forestal Land, Timber & Railways Co.* [1942] A.C. 50, 81.

² *Becker, Gray & Co. v. London Assurance Corporation* [1918] A.C. 101, 117. Note also Willes J. in *Esposito v. Bowden* (1857) 7 El. & Bl. 763, 781: 'The force of a declaration of war is equal to an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence.'

³ The decision was followed by Atkin J. in *Associated Oil Carriers, Ltd. v. Union Insurance Society of Canton* [1917] 2 K.B. 184 (insurance on freight).

⁴ The appropriate method of using the new clause was described in a statement appearing in *Lloyd's List* of June 19, 1919, and printed on pp. 143, 144 of the first edition of this book. The attitude of underwriters towards the risks disclosed by *Sanday's* case and now intended to be excluded by the Frustration clause and imposed upon shipowners and merchants raises a big question which is economic rather than legal. A view which is critical of the underwriters' attitude found expression in two letters from the late Mr Charles Wright of Lloyd's to *The Times* newspaper published on July 31 and August 5, 1919.

This clause was also used in the case of hulls and freights insured for the voyage.

A case in which *Sanday's* case was invoked and which followed it up to the House of Lords, is *Becker, Gray & Co. v. London Assurance Corporation*.¹ The plaintiffs were British merchants owning a cargo of jute laden on board a German steamship, the *Kattenturm*, which at the outbreak of war was on a voyage from Calcutta to Hamburg, the jute having been shipped under a c.i.f. contract. On August 3 she left Malta bound westwards, later heard of the declaration of war, and, voluntarily and without being chased, entered the then neutral port of Messina where she arrived on the 6th; after lying there for about a month she proceeded to Syracuse. A letter from the British Admiralty, which was treated as evidence, stated that: 'Any German steamer proceeding on or after August 5 last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral waters.'

On September 1 the plaintiffs gave notice of abandonment to the underwriters. As in *Sanday's* case, the F.C. and S. clause had been deleted upon payment of an extra premium, and the perils insured against included 'men-of-war, . . . enemies . . . takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality whatsoever'.

All three Courts had no difficulty in distinguishing the case from *Sanday's* case, and in giving judgment for the defendant. The adventure was frustrated when the master prudently put into Messina with no thought of resuming his voyage until after the war. 'It was self-restraint, not restraint of princes, that hindered the captain from putting to sea' (per Lord Sumner).² It was not illegal, as in *Sanday's* case, for him to continue his voyage. To the plaintiffs' other main point, that there was a constructive loss due to the peril of capture, the answer was that the loss was due not to the peril of capture but to the fear of it, and the peril had not yet begun to operate. Moreover, the voluntary act of the master intervened between the occurrence of any peril insured against and the loss, so that it could not be said that any peril was the proximate cause of the loss.

There the question remained until the outbreak of the recent war gave rise to three test cases of great importance—*Rickards v. Forestal Land, Timber and Railways Co.*; *Robertson v. Middows*; and

¹ [1915] 3 K.B. 410; [1916] 2 K.B. 156; [1918] A.C. 101.

² [1918] A.C. at p. 111.

Kahn v. W. H. Howard,¹ which were tried together by Hilbery J. and went to the Court of Appeal and the House of Lords. The policies, though not identical, were similar enough to raise the same main point of law. They all covered cargoes against both marine and war risks, and they were all subject to the diminution of war risks resulting from the inclusion of the so-called 'Frustration Clause', which was in the form introduced after *Sanday's* case and quoted above,² with the irrelevant exception that the concluding words were 'kings princes peoples usurpers or persons attempting to usurp power'. The main question was whether in the circumstances the loss fell within the risks *included* in the war risks clause or within the risks *excluded* by the Frustration Clause.

The cargoes were all on board German steamers which were pursuing their voyages when the war broke out. The masters of the steamers had been instructed that in the event of war between Germany and Great Britain they must either enter a German port or, rather than be captured, scuttle their ships. One reached a German port, the other two were scuttled to avoid capture.

In all three cases the owners of cargo lost their cargo, and in the absence of the Frustration Clause could have recovered under their policies on the ground that there was a constructive total loss due to one or more of the war risks enumerated therein, such as 'men-of-war . . . enemies . . . surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people . . .', when the masters acted upon the instructions of their Government so that the cargoes were converted to the use of that Government, with the consequences described above. It was, however, argued that the loss in these cases was due to the frustration of the adventure arising from a restraint of princes, namely, the orders of the German Government and the execution of those orders by the masters of the ships, and that this was a risk excluded by the Frustration Clause. The answer to this contention given by the Court of Appeal (reversing Hilbery J.) and upheld by the House of Lords was that loss of goods and 'loss of, or frustration of, the insured voyage or adventure' are not identical or co-terminous. The risk to the goods and the risk to the voyage or adventure are different risks. The latter risk, unless excluded by the Frustration Clause, is an additional risk, not an essential part of the former risk. In the words of Lord Wright:³

'The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods . . . a

¹ [1942] A.C. 50.

² P. 252.

³ [1942] A.C. at pp. 90, 91.

policy on goods is in truth one covering a composite interest, the physical things or chattels, and also the expected benefit from their arrival. The subject-matter may be described as chattels-cum-adventure...the adventure may be lost even though the goods are neither damaged nor lost nor taken from the assured's possession or control.¹...To cases of that type the frustration clause has a clear and precise application, but in my opinion it cannot be applied to a case where the assured is claiming for loss of or damage to the actual physical things or chattels. He is entitled to resist the application of the clause on the ground that the primary subject-matter is the goods, and that the adventure is merely ancillary or accessory....'

Accordingly, the Frustration Clause did not protect the underwriters, and the cargo-owners recovered. The foregoing summary is a simplification, but, perhaps, not an over-simplification of facts and points of law that were not identical in all three cases. It does not do justice to a controversy which evoked arguments of great acuity and a series of impressive judgments, but it will be pardoned on grounds of space if it has made clear the main question which was raised and answered—a question extending far beyond the impact of war upon the traditional Lloyd's form of marine and war risks policy.

E. WAR OR MARINE RISKS

There are two other questions which arise frequently during war and form the subject of numerous decisions. They also do not illustrate the effect of the impact of war upon principles of law, and we propose to do little more than call attention to their existence.

The first question owes its prominence to the German policy of 'spurlos versenkt'² adopted during the War of 1914 to 1918. It arises when it is not clearly apparent whether a missing ship was lost by perils of the seas or by war risks, and she was insured with one set of underwriters or one company against marine risks and with another set of underwriters or another company against war risks, or is only insured against one or the other of these classes of risks. Who is to pay? The decisions given during the last war are numerous and will be found in Arnould.³ The law was carefully examined by Bailhache J. in

¹ E.g. *Sanday's case*, above, p. 250.

² The expression occurred in an intercepted despatch from the German *charge d'affaires* in Argentina to his Government in 1917, in which he recommended the application of this policy to Argentinian ships: Garner, *International Law and the World War*, § 490.

³ *Op. cit.* §§ 905a, 905b.

Munro, Brice & Co. v. War Risks Association,¹ though the Court of Appeal held that his inference of fact was wrong.²

F. CONSEQUENCES OF HOSTILITIES OR WARLIKE OPERATIONS

The second question, or group of questions, is purely a matter of interpretation. It has been productive of a very large number of decisions, which, not unlike the innumerable decisions upon testamentary expressions, are of great importance to the parties litigating, but make little contribution to the development of the law. In its commonest form, the question is: What is the meaning of 'consequences of hostilities or warlike operations' or similar expressions occurring in a policy amongst the substantive risks insured or in a clause excepting them from the scope of the policy? (The same and similar expressions occur in charterparties upon the terms of which ships are requisitioned by the appropriate Department, which in the War of 1914 to 1918 accepted the risks mentioned above.) The principal decisions given during the War of 1914 to 1918 are discussed by Arnould.³ A new crop was reaped during the War of 1939 to 1945.⁴

G. FIRE AND OTHER NON-MARINE INSURANCE UPON PROPERTY⁵

Pre-war Insurances. Do these insurances fall under the general principles which have already been discussed, or are they governed by special rules of their own?

Our submission is that, once the marine insurance cases had freed themselves from the early notion that illegality consisted in indemnifying an enemy against the consequences of British or co-belligerent capture, they form a particular application of the general principle of the abrogation of executory contracts between British subjects and enemies in the territorial sense, and that all annual insurances of property, marine or non-marine, are governed by this principle.

¹ [1918] 2 K.B. 78.

² *Munro, Brice & Co. v. Marten; Same v. The King* [1920] 3 K.B. 94.

³ *Op. cit.* 905 c-905 f.

⁴ *J. Wharton Shipping Co. v. Mortleman* [1941] 2 K.B. 283 (C.A.), *Yorkshire Dale Steamship Co. v. Minister of War Transport* [1942] A.C. 691, *Clan Line Steamers v. Liverpool & London War Risks Insurance Association* [1943] K.B. 209, *Larrinaga Steamship Co. v. The King* [1944] K.B. 124 (C.A.); affirmed [1945] A.C. 246; *Athel Line Ltd. v. Liverpool & London War Risks Association Ltd.* [1946] K.B. 117 (C.A.); *Ocean Steamship Co. Ltd. v. Liverpool & London War Risks Association Ltd.* [1946] K.B. 561 (C.A.).

⁵ For a summary of the provisions of the Peace Treaties of 1919-1920 upon contracts of fire insurance, see Bunyon, *Fire Insurance* (7th ed. 1923), pp. 422-426.

In *Janson v. Driefontein Consolidated Mines*¹ and in *Robinson Gold Mining Co. v. Alliance Assurance Co.*,² the policies were both marine policies and the losses occurred on land through seizure by a foreign Government *before* and in anticipation of war with Great Britain. In the former case the plaintiff company was enemy in the territorial sense when the writ was issued; in the latter case the plaintiff company had been enemy, but the war was officially at an end before the writ was issued. It was not suggested that the fact that the losses occurred on land attracted rules of law different from those that governed marine insurance.³

From the point of view of the general principle that all⁴ pre-war contracts which involve intercourse with the enemy are abrogated upon the outbreak of war (with a saving for rights of action already accrued), we can see no difference whatever between marine insurance and any other kind of insurance upon property. If the premium has already been paid, there would be no intercourse with the enemy unless a loss occurred; but that is quite immaterial, because the parties, in making the contract, contemplate that, if a loss occurs during its currency, intercourse between them must take place for the purposes of its settlement and payment. It is, therefore, not surprising that in *Excess Insurance Co. v. Mathews*⁵ it was assumed that a pre-war policy issued by a British insurance company to a Hungarian company against loss by fire upon the profits of a mill in Hungary would have been abrogated by the outbreak of war between Great Britain and Hungary if the Treaty of Peace between those countries had not preserved its validity. By reason of the provisions of the Treaty the British insurance company paid under the Clearing Office procedure a loss incurred by the Hungarian company, and thereupon succeeded in this action in recovering the proportionate amount due from one of their reinsurers, the defendant.

But for the fact that the generality of the principle of abrogation referred to above as general is doubted by high text-book authority, it would not seem necessary to say anything more upon the matter.

¹ [1902] A.C. 484.

² [1904] A.C. 359.

³ In *Nigel Gold Mining Co. v. Hoade* [1901] 2 K.B. 849, the policy was not a marine one. It merely insured the plaintiff company's property while on the premises at its mine in the Transvaal and would normally have been followed by another policy to cover transit to England. The seizure by the Government of the South African Republic took place at the mine *during* the war. The national character of the plaintiff company was ambiguous, but the learned judge preferred to regard it as British, and the war was at an end before the writ was issued. Not a satisfactory case.

⁴ See pp. 98-101 for certain exceptions.

⁵ (1925) 31 Com. Cas. 43.

But Macgillivray, who analyses the question more deeply and more carefully than any other authority known to us, expresses doubts. He writes:¹

'Two distinct principles of public policy may be extracted from the marine insurance cases, viz.: (a) that as one of the main objects of war is to destroy the enemy's commerce a contract of indemnity is illegal in so far as it operates to indemnify an enemy against commercial losses during war, and (b) that a contract is illegal in so far as it operates to indemnify an enemy against any of the consequences of war. Although there are *dicta* in some of the cases which, taken by themselves and apart from the decision involved in the case would appear to support wider principles of public policy, there does not appear to be any reliable authority for the propositions sometimes contended for (a) that a contract is illegal in so far as it operates to indemnify an enemy against any loss arising during war, or (b)² that a contract is illegal in so far as it operates to protect a British subject or an alien friend against any loss inflicted by British or allied arms during war.'

He then submits certain propositions, of which the following is one:³

'(3) It is not illegal for a British office to contract to pay the assured [though doubtless he implies that payment to the assured would be deferred until after the war] a sum of money on the happening of an event occurring during the prosecution of hostilities between the assured's country and Great Britain, provided such event occurs independently of such hostilities and is not a commercial loss.'

Let us take the case of a policy issued in July 1939, whereby a British underwriter insured a German householder in Germany against loss by ordinary fire or burglary for a period of twelve months. No loss has occurred before the outbreak of war on September 3, 1939. Surely the authorities already cited must drive us to the conclusion that upon the outbreak of war this policy was abrogated,⁴ for the reason that it

¹ *Insurance Law* (2nd ed. 1937), p. 280.

² With regard to (b), which is not relevant to the point which I am seeking to establish, surely a policy must be illegal if it purports to protect property involved in some undertaking inimical to the success of British or allied arms such as trading with the enemy in the case of a British or allied subject, or the carriage of contraband, breach of blockade, or other unneutral service being rendered to our enemy by a neutral subject. I can see nothing illegal in a policy which protected a British or neutral subject against, say, the detention of a ship in port to prevent her from falling into the hands of the enemy with the result that a perishable cargo was ruined, or the sinking of a British ship in order to avoid capture by the enemy, or the destruction of house property in order to procure an unobstructed field of fire.

³ *Op. cit.* p. 281. See also at p. 288: 'It is submitted that a contract of insurance [*scilicet*, non-marine] is never dissolved by war.'

⁴ Macgillivray would not agree—see p. 283. I entirely concur in his statement (on p. 287) that 'fire policies and others which are renewable only upon acceptance

is an executory contract involving intercourse with the enemy (*Furtado v. Rogers*,¹ and *Esposito v. Bowden*).²

With great respect it is suggested that his qualification, 'provided such event occurs independently of such hostilities and is not a commercial loss', is derived from an age when the rule governing marine insurance had not been subsumed under the general principle of abrogation of executory contracts involving intercourse with the enemy.³

Insurances effected during war. There can be no doubt that, as in the case of marine insurance, no contract of non-marine insurance can be made during a war between a person in this country and an enemy in the territorial sense, whichever of them may be insurer or assured. The annual renewal of the ordinary contract of fire or other non-marine insurance of property involves the making of a new contract each year.

II. LIFE INSURANCE

PRELIMINARY

Here indeed we are upon an uncharted sea.⁴ So far as we are aware, there was no English judicial authority before the War of 1914 to 1918, and the American authorities, though numerous, emit no very helpful ray of light.

The typical contract of life insurance differs fundamentally from typical contracts of insurance on property, both marine and non-marine. (a) The former is usually a contract intended to last for many years, and is sometimes only terminated by death. A marine policy is usually a contract for the voyage or for 12 months, while a non-marine policy is often capable of annual renewal by agreement between the parties. (b) In the former the assured may at any time terminate the contract by not paying the annual premium, but if he pays it the insurer is bound to accept it. In the latter the insurer is not bound to renew the contract. (c) The former is a piece of property which increases in value year by year and the assured usually has the right to surrender it in return for a lump sum. No such right attaches to the

of the renewal premium' cannot be renewed during war when one party is an enemy because intercourse with the enemy would be involved. The continued existence of the contract embodied in the policy after the outbreak of war involves a potential intercourse with the enemy, and that is why in my submission it is abrogated.

¹ Above, p. 89.

² Above, p. 90.

³ See also Pennant in 18 L.Q.R. (1902), pp. 289-296 ('Insurances of Enemies' Property') and comment above, p. 243, n. 2.

⁴ For a summary of the effect of the provisions of the Peace Treaties of 1919-1920 upon contracts of life insurance, see Macgillivray, *op. cit.* pp. 291, 292.

latter. Both types are technically choses in action, but the former is more in the nature of a piece of property than the latter. Thus it is frequently the subject of a mortgage and can be bought and sold on the open market.

If our Courts had formed a clear view as to the nature of a policy of life insurance, our problems would be easier to solve. But unfortunately it cannot be said that they have. Macgillivray¹ says that:

'There has...been considerable difference of judicial opinion as to whether the contract of life insurance made in consideration of an annual premium is an insurance for a year with an irrevocable offer to renew upon payment of the renewal premium, or whether it is an insurance for the entire life subject to defeasance or forfeiture upon non-payment of the renewal premium at the times stated.'

And later²

'in America, where the subject has been more carefully considered, it has been held that a life policy is not an insurance for a single year with a privilege of renewal from year to year by paying the annual premium, but is an entire contract of insurance for life, subject to discontinuance or forfeiture for non-payment of any of the stipulated premiums.'³

Although there is no express English judicial authority on the point, this is the opinion which seems to have the largest support in England to-day, and the policies of some companies seek to emphasize this construction by avoiding the use of the term 'renewal premiums' and speaking of 'first premium' and 'subsequent premium'. In Hailsham, *Laws of England*,⁴ we are told that 'the typical contract of life assurance may be defined in general terms as a contract under which the insurers undertake to pay a specified sum of money upon the death of a particular person on consideration of a premium to be paid during the continuance of the life insured'.

In *Seligman v. Eagle Insurance Co.*, which is believed to be the only English decision upon the effect of war upon a life insurance policy,

¹ *Op. cit.* p. 365, citing Willes J. in *Pritchard v. The Merchants' Life* (1858) 3 C.B. (N.S.) 622, 643, Lord Chelmsford in *Phoenix Life v. Sheridan* (1860) 8 H.L.C. 745, 750, *Stuart v. Freeman* [1903] 1 K.B. 47, and (a Canadian case) *Frank v. Sun Life* (1893) 20 Ont. A.R. 564.

² At p. 366, citing *New York Life Insurance Co. v. Statham* (1876) 93 U.S. 24; Hudson, p. 1304.

³ A number of conflicting American decisions are examined by Campbell, *Law of War and Contract* (1918), pp. 198-217; they all appear to be decisions given in cases arising out of the Civil War, and it is not always safe to argue from these cases to cases arising out of international war.

⁴ Vol. xviii, § 813.

Neville J., by inference, but *obiter* because in this case the policy had been mortgaged to the company and the 'life' and his sureties had covenanted to pay the annual premiums required to maintain the policy, rather seems to incline to the latter view—an entire contract of insurance for life—though he expressed no opinion upon the question of principle.¹

CONTRACTS ATTEMPTED TO BE MADE DURING THE WAR

Let us begin by disposing of what is almost the only aspect of life insurance which is not controversial. It is clear that during the war no contract of life insurance can be effectively made between any person resident, being or carrying on business in this country (including a corporation registered under the law of or carrying on business in this country) and an enemy in the territorial sense, which is the sense in which the term 'enemy' is used in this chapter. Any attempt to make such a contract is both criminal and nugatory, unless licensed by the Crown.

In theory, the fact that the 'life' insured is an enemy would not vitiate an insurance otherwise lawful, provided that he is not a party to the contract, and takes no benefit from it; in practice, it would in many cases be almost impossible to effect such an insurance without some intercourse with the 'life' such as procuring evidence of age, arranging for medical examination, etc., though it must be remembered that for certain purposes insurances are frequently effected upon the lives of prominent persons, such as members of a Royal family, without medical examination.

PRE-WAR CONTRACTS

We now turn to the difficult and highly controversial question of the effect of the outbreak of war upon pre-war contracts, and we shall begin by confining our attention to the case which arouses most interest in a country like Great Britain² which is an 'exporter' of insurance, that is, a contract between a British insurance company and an enemy. Let us first attempt to make certain statements of principle.

Consideration of principles. (1) A distinction is necessary between rights of performance under a contract and property rights connected

¹ [1917] 1 Ch. 519, where counsel cited in favour of the United States view *Fryer v. Morland* (1876) 3 Ch.D. 675, 685; *In re Anchor Assurance Co.* (1870) L.R. 5 Ch. 632, 638; and *In re Harrison & Ingram* [1900] 2 Q.B. 710, 717.

² We do not presume to deal with contracts governed by the law of Scotland.

with a contract, for there is no automatic confiscation of private enemy property by our law; that can only be done by the Crown, using the appropriate procedure, or by the legislature, of which the Crown is a part. Thus in *Hugh Stevenson's case*¹ the contract of partnership was dissolved by the outbreak of war, but the enemy partner did not lose his share of the partnership assets and would be entitled after the war to receive some allowance in respect of the use by his British expartner of the former's share of the assets.

(2) There seem to be three possible effects which the mere outbreak of war might have upon a pre-war contract of life insurance between a British insurance company and an enemy. First, it might be automatic abrogation, which is the commonest, though not the universal, effect upon contracts still executory upon the outbreak of war. Secondly, it might be suspension (a rare case, of which the shareholder's contract of membership is probably the only clear instance), that is, suspension for the duration of the war of performance of some or all of the obligations of the contract, which is different from the suspension during the war of an enemy's right of action arising upon a default in performance occurring before the war, or, in the case of a contract which survives the outbreak of war, upon a default occurring during the war.² Thirdly, it might be *nil*, as in the case of a lease,³ that is to say, all the obligations might remain unaffected by the mere outbreak of war, though their performance may be hampered by the rule against intercourse with the enemy.

(3) If the third possible solution is the correct one, then the contract has survived the first critical point of time, that is, the outbreak of war, and attention must be focused upon its second crisis, namely, the first or any subsequent date after the outbreak of war upon which a premium falls due. If there is a default in payment, either voluntarily or because the law of the enemy country prohibits payment or English law prohibits receipt of the payment, further questions arise. By the terms of the policy, does non-payment of the premium *ipso facto* terminate the contract, or does it merely give the insurance company the option to terminate it? Is there any other source from which payment may lawfully be made, and, if so, is the insurance company obliged to resort to that source or has it an option in the matter? In short, whereas in the case of an executory contract of sale of goods or of affreightment, the critical question is the effect of the outbreak of war, in the case of

¹ [1918] A.C. 239.

² See Lord Reading C.J. in *Halsey v. Lowenfeld* [1916] 2 K.B. 707, 714 (top).

³ *Halsey v. Lowenfeld* (*supra*), and see note 1 on p. 100 of this book on *Porter*

a contract of life insurance the critical question may be not only that but also the effect of default in payment of the first premium due after the outbreak of war or of any subsequent premium.

(4) If a contract between a person in this country and a person in the enemy country is by operation of law abrogated upon the outbreak of war, nothing that the Crown acting through the Trading with the Enemy Branch may do can *ipso facto* reintegrate that contract;¹ reintegration can only be effected by the agreement of both parties; the Crown may license intercourse with the enemy party but it must be shewn that both parties have agreed to reintegrate the contract.

(5) The Crown, acting through the Trading with the Enemy Branch or some other appropriate organ of government, has a common law power of licensing intercourse with the enemy and a statutory power under subsection 2 of section 1 of the Trading with the Enemy Act, 1939, of rendering innocent an act which would otherwise amount to statutory trading with the enemy; but it has no power to make new rules of law or to revive a contract abrogated by operation of law.

Judicial authority. What light can be obtained from this source? If it may be said with great respect, the judgment of Neville J. in *Seligman v. Eagle Insurance Co.*² is not entirely free from obscurity. All that it decides is (i) that two policies of insurance which had been issued before the war by a British company to, and upon the life of, an enemy national who shortly after the outbreak of war left this country, and went to the enemy country, and which had been mortgaged to the company by him in order to secure a loan, were not abrogated by the fact of the policy-holder becoming an enemy in the territorial sense; (ii) that the company could, as the law then stood, lawfully and without committing the offence of trading with the enemy, accept from a surety in this country the premiums due upon the policies in October 1914 and October 1915, that is, after the outbreak of war; and (iii) that the surety was entitled, upon paying to the company the amount due under the mortgage, to an assignment of the policies. The learned judge said:³

‘The right of the policy-holder is clearly suspended during the war,⁴ and were he to die to-morrow his executors would recover nothing from the company; but whenever peace is restored between the

¹ *Esposito v. Bowden* (1855) 4 El. & Bl. 963, 975; (1857) 7 El. & Bl. 763, 778; and see above, p. 97.

² [1917] 1 Ch. 519; and see above, pp. 235, 236.

³ At p. 526.

⁴ Does the learned judge mean that the policy-holder's right to performance is suspended during the war or his right to sue for non-performance? In either case his executors could recover nothing during the war.

countries normal relations in this regard will be resumed, and, although the right of the policy-holder is undoubtedly suspended, if the policy itself is not made void either at the time when war was declared¹ or at the time when the current year of the policy ran out, I can see nothing illegal in the acceptance of the premiums by the company because no benefit can accrue to the enemy alien at all as the result of the payment of his premium; but what will result is that perhaps some day somebody who is not an enemy alien may have a right to sue the company for the amount assured. It seems to me this is one of those cases where the right² is suspended.'

The learned judge's view is clearly against abrogation; he said³ 'there is nothing in the nature of the contract [*scilicet*, of life insurance] to put an end to it on the outbreak of war... the insurance company could have sued the assured under his contract for the amount of the premiums due under the covenant contained in the policy...', provided that in so doing they would not be guilty of unlawful intercourse with the enemy, which in his opinion would not be the case. It is pertinent to remark that upon the outbreak of war the assured by going to the enemy country, the law of which prohibited him from remitting a payment to this country, put it out of his power to perform his contracts with the company and with the surety, whose security was thus jeopardized and who took appropriate action to safeguard it by tendering the premiums when they became due.

It should also be noted, on the subject of accepting payments from an enemy, that in 1917 there was in force a Trading with the Enemy Proclamation of September 9, 1914, which contained a proviso to the effect that 'Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of War or otherwise permitted'; whereas to-day the proviso in section 1 (2) of the Trading with the Enemy Act, 1939, is to the effect that 'a person shall not be deemed to have traded with the enemy by reason only that he has... (ii) received payment from an enemy of a sum of money due⁴ in respect

¹ Which begs a crucial question.

² Right to performance or right of action?

³ At p. 525.

⁴ It is customary to speak of premiums being 'due', but, save in exceptional cases, the holder of a life policy is at liberty either to pay or not to pay the premiums, and, if he fails to do so, the only consequence is that the policy lapses. If, therefore, the word 'due' in this proviso means legally due and recoverable by action, it would appear that a life insurance company is not entitled to the benefit of paragraph (2) of the proviso and must rely on the authority of Government referred to in paragraph (1) of the proviso.

of a transaction under which all obligations on the part of the person receiving payment had already been performed when the payment was received, and had been performed at a time when the person from whom the payment was received was not an enemy'. The same proviso protects acts authorized by the appropriate organ of the British Government.

From the American decisions, so far as available to us, no very clear guidance is obtainable; it should be noted that all those about to be mentioned arose out of the Civil War, and that it is only with caution that decisions arising out of a war in which, though waged in general in accordance with international law, the Federal Government did not admit the sovereignty of the Confederate States,¹ can be applied to circumstances arising out of the true international war. Campbell in *Law of War and Contracts* (1918)² examines a number of these cases and classifies them as follows:

(i) Where the failure to pay a premium falling due during the war was held to avoid the policy in accordance with its own terms; of this class *Worthington v. Charter Oak Life Insurance Co.*³ is an example. *New York Life Insurance Co. v. Davis*,⁴ while involving the question of tender of premiums to an agent who had no authority to receive them, is to the same effect.

(ii) Where failure to pay a premium due during the war merely suspends any remedies upon the contract during the war, with the result that after the war the validity of the policy is revived upon tender of any premiums which may have become due since the outbreak of war: *New York Life Insurance Co. v. Clopton*,⁵ *Cohen v. New York Mutual Life Insurance Co.*,⁶ *Sands v. New York Life Insurance Co.*⁷

(iii) Where failure to pay premiums falling due during the war was held to avoid the policies but to give the assured the right to claim 'the equitable value of the policy arising from the premiums actually paid'. To this class belong *New York Life Insurance Co. v. Statham*,⁸ and *Manhattan Life Insurance Co. v. Buck*.⁸

It will be noted that in the case of none of these three categories was it held that a pre-war policy crossing the line of war is *ipso facto* abrogated by the mere outbreak of war.

¹ See Spaight, *War Rights on Land* (1911), p. 13.

² Pp. 198—217.

³ (1874) 19 Am. Rep. 495.

⁴ (1877) 95 U.S. Rep. 425.

⁵ (1869) 3 Am. Rep. 290.

⁶ (1872) 10 Am. Rep. 522.

⁷ (1872) 10 Am. Rep. 535.

⁸ Reported together (1877) 93 U.S. Rep. 24. Moore, *Digest of International Law*, § 1137, cites *Semmes v. Hartford Insurance Co.* (1871) 13 Wall. 158; and *Abell v. Penn Mutual Life Insurance Co.* (1881) 18 W. Va. 400.

Conclusions from principles and judicial authority. An attempt must now be made to draw certain conclusions from what seem to be the relevant general principles and from the slender judicial authority. In the present lack of clear guidance a writer may be pardoned if he states his conclusions tentatively, and what follows must be so regarded by the reader without the necessity of repeated warnings.

It is submitted that the clue lies in the proprietary character of the ordinary policy of life insurance. It is true that a right under any contract is a chose in action and falls within the category of property. But, as has already been suggested,¹ a policy of life insurance is in a peculiar sense a piece of property. It is frequently sold and mortgaged, and it usually provides for the acquisition of a surrender value.² It may not strictly fall within Lord Dunedin's category of contracts which are 'concomitants of rights of property',³ an expression which is more appropriate to the covenants contained in a lease or a restrictive covenant attached to land,⁴ but it can be said not unfairly to fall within the general intention of that expression. It is submitted that, amongst the contracts upon which there exists a clear English pronouncement as to the effect of a war, the nearest analogy is the lease in *Halsey v. Lowenfeld*,⁵ and that, apart from certain special cases to be mentioned, the mere outbreak of war does not abrogate a contract between a British insurance company and an enemy, whatever its later fate may be.

We shall now seek to apply this general conclusion.

(a) *Claim already accrued.* If the stipulated event, be it death or the attainment of a certain age, has occurred before the outbreak of war, the right of an enemy policy-holder to recover from a British company is suspended until after the war as in the case of other accrued rights of action; and the right of a British policy-holder against an enemy company can be enforced during the war if he can effect service, or substituted service, or obtain an order dispensing with service.⁶ It must be remembered that some policies do not make the policy moneys payable until the lapse of a certain interval after the occurrence of the stipulated event.

(b) *Claim not yet accrued. Insurance for a limited period.* The not very common case of an insurance for a limited period such as twelve months

¹ P. 259.

² A statutory right to a surrender value exists in the case of policies of industrial assurance in the circumstances described in the Industrial Assurance Act, 1923: see Macgillivray, *op. cit.* p. 178.

³ In *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. 260, at p. 269. See above, p. 99.

⁴ See Lord Reading C.J. in *Halsey v. Lowenfeld* [1916] 2 K.B. 707, 713.

⁵ *Supra.*

⁶ See above, p. 104.

raises special difficulties. It may be argued that there is a difference in law between a contract for twelve months only and a contract which is intended to last until death or the expiry of a definite number of years and is embodied in a policy which becomes increasingly valuable as the years pass and that the former is merely a contract, the latter something more than a contract, i.e. a 'concomitant of the rights of property'. Accordingly it may be that the principle applicable to a sale of goods or affreightment or marine or fire insurance should apply in this case with the consequence that the outbreak of war abrogates the contract. On this principle, if the premium is then due and has not been paid an enemy insurance company cannot sue for it until after the war; a British insurance company can sue for it at once¹ if it can effect service or obtain an order for substituted service or for dispensing with service. So far as we have been able to ascertain, the distinction sought to be made above has not yet been judicially considered.²

(c) *Claim not yet accrued. Single payment premium.* If the premium took the form of a single payment of premium which was made before the outbreak of war, the question is more one of property than of contract; when the insurance company is British, and the stipulated event, be it death or the attainment by the assured of a certain age, occurs during the war, then the right of the enemy or his representatives to recover the sum insured from a British insurance company is deferred until after the war; when the insurance company is enemy, and the stipulated event occurs during the war, the British assured can—subject to any defence open under the proper law of the contract—sue for the sum insured at once, provided that he can effect service upon the enemy company,³ and if there are assets in this country he will be able to enforce his judgment, unless they have been paid over to or vested in the Custodian. There is no more reason why the right of the British assured to recover should be deferred until after the war than the right of a British lessor to recover rent accruing during the war from an enemy lessee,⁴ nor, since the

¹ This would be unlikely because in the usual form of a British policy the company is not on the risk until the first premium is paid.

² It must be admitted that it is difficult to defend the drawing of a line of distinction between a contract for one year and a contract for two, three or more years. But it is arguable that in legal character and in the intention of the parties there is a difference between a contract whereby I protect myself, standing to suffer damage if a certain life in which I have an insurable interest comes to an end within the next twelve months, and an ordinary life or endowment policy on my own life which is expected both by myself and by the company to remain in force until my death or the expiration of a fixed number of years.

³ See above, p. 104.

⁴ *Halsey v. Lowenfeld* [1916] 2 K.B. 707 (C.A.).

British assured had performed all his obligations under the contract before the war broke out, is he precluded by the proviso to section 1 (2) of the Trading with the Enemy Act, 1939.

If the stipulated event does not occur during the war, the contract survives the war unaffected—whether the insurance company is British or enemy.

As Lord Dunedin has said: 'there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant...'¹

(d) *Claim not yet accrued. Annual or other periodical premiums. Insurance company British.* (1) Such a payment is probably forbidden to the enemy by the law of his own country, but let us assume that he obtains permission to make the payment in the hope of preserving his insurance. Neville J. in *Seligman's* case, while admitting that the receipt of a payment involves intercourse between payer and payee, said that the intercourse involved in a British insurance company accepting a premium from an enemy would not be unlawful intercourse. He relied upon *Halsey v. Lowenfeld*² and (apparently) the following provision (paragraph 7) contained in the Trading with the Enemy Proclamation (No. 2) of September 9, 1914: 'Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of War or otherwise permitted.' With this provision, however, should be contrasted the corresponding provision now in force and contained in the provision in section 1 (2) of the Trading with the Enemy Act, 1939:

'Provided that a person shall not be deemed to have traded with the enemy by reason only that he has... (ii) received payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving payment had already been performed when the payment was received, and had been performed at a time when the person from whom the payment was received was not an enemy.'

If the effect of the acceptance of the premium is to keep the policy alive for another year, then it places new obligations upon the insurance company accepting it and is not protected by this proviso, and it is submitted that it is unlawful and nugatory unless its acceptance is authorized by the appropriate department of Government. It is under-

¹ *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. 260, 269.

² [1916] 2 K.B. 707 (C.A.).

stood that in practice the British Life Offices held a general authority from the Trading with the Enemy Branch to accept premiums paid by or on behalf of enemies. This practice renders it unnecessary to consider whether or not by common law or under the Trading with the Enemy Act, 1939, the acceptance of premiums by British insurance companies in these circumstances was illegal, either because 'the concurrence involved in accepting the payment'¹ amounts to unlawful intercourse with the enemy, or because it is a dealing with or for the benefit of the enemy. Neville J.'s statement² that 'the receipt of money from an enemy in itself involves no unlawful intercourse' must be read in the light of the terms of the Trading with the Enemy Proclamation then in force and quoted above.

(2) Let us suppose, however, that the enemy, either voluntarily or by reason of a prohibition by the law of his country, does not pay the premiums due. Further questions then arise: (i) In what circumstances can the British company be compelled to accept payment of the premiums from another source? (ii) In what circumstances is it at liberty to make up the premiums from another source?

(i) In the following circumstances it is believed that it would be lawful for a British company to receive, and it would be bound to accept, payment of the premium:³ (a) from a surety in this country, if the enemy party derived no benefit thereby (*Seligman v. Eagle Insurance Co.*);⁴ (b) from a non-enemy assignee of the policy under a pre-war absolute assignment, if the enemy party has parted with all interest in the property; (c) from the Custodian of Enemy Property, if he considered that he had power to make a payment out of the assets of the enemy in his hands for the purpose of preserving the enemy's property, just as he might pay rent due under a lease in order to avoid a forfeiture—for the preservation of enemy property is one of the statutory objects of his appointment (section 7 (1) of the Trading with the Enemy Act, 1939);⁵ (d) if by the terms of the policy the company is obliged to apply the surrender value or any declared bonus or dividend in payment of the premium and there is a balance available. It is believed that in practice the British Life Offices held a general

¹ [1917] 1 Ch. at p. 525.

² *Ibid.*

³ See Macgillivray, *op. cit.* pp. 283–287.

⁴ *Supra.*

⁵ Macgillivray, *op. cit.* p. 284, suggests that a British company could lawfully receive premiums from a person holding a pre-war general power of attorney from the enemy, and cites *Tingley v. Müller* [1917] 2 Ch. 144 (C.A.), but, with respect, I venture to submit that that decision turns upon the peculiar position of an irrevocable power of attorney under the Conveyancing Acts; for discussion, see above, p. 209.

authority from the Trading with the Enemy Branch to apply, at any rate, surrender values for this purpose; without this authority such application would be illegal under the Trading with the Enemy Act, 1939, section 1 (2), for, if not a payment for the benefit of the enemy, it is at any rate a dealing for the benefit of the enemy, unless as in *Seligman's* case or, as might occur after an absolute pre-war assignment of the policy to a non-enemy, the enemy has no further interest in the policy.

(ii) If by the terms of the policy the company has an option either to apply the surrender value or any declared bonus or dividend in payment of the premium or not, then upon obtaining the authority of the appropriate department of Government it may lawfully do so and thus maintain the policy. Without such authority such application would be illegal under the Trading with the Enemy Act, 1939, section 1 (2), for the reason, and subject to the exception, mentioned above under (d). Where no express option of this kind exists, the company may, subject to the necessary authority from the Government, maintain the policy in force by advancing premiums against the surrender value. To do this without such authority would probably, it is submitted, be unlawful under section 1 (2) of the Trading with the Enemy Act, 1939, either as a dealing for the benefit of an enemy, or a payment for the benefit of an enemy creating further obligations upon the recipient; the company might be regarded as an agent of necessity. It is understood that during the recent war the Trading with the Enemy Department intimated that it would have no objection to the application by insurance companies of surrender values or any other moneys in their hands in or towards the upkeep of Life or Endowment policies if they desired to do so, and whether or not they were under obligation, apart from the war, to do it. Accordingly, the companies would appear to have had the necessary authority to advance the amount of the premiums even out of their own funds, and it is believed that some of them did so. It is, however, open to grave doubt whether, in the absence of any provision in the policy giving the company a charge for the unpaid premiums, the company would have a right after the war to recover premiums so paid from the assured or his representatives or to set them off against a claim for the policy moneys or the surrender value as at the date of lapse,¹ and it is to be hoped that the matter will be one of those which are regulated by treaty.

If, however, the premium is not lawfully paid or made up from some other source in one of the ways discussed above, what is the

¹ See Macgillivray, *op. cit.* pp. 975-980 (Salvage Premiums).

effect upon the policy? We submit that it is forfeited and that the contract is terminated—not suspended; terminated, moreover, by the operation of the conditions of the contract and not by the outbreak of war.¹ It may be said that this is hard on the enemy who might be allowed by the law of his own country to tender the premium in order to preserve his policy, while it is a rule of English law that prevents the premium from being accepted. But if the proper law of the contract is English, as in most cases it would be, that is part of his bargain; if the proper law is the law of the enemy country, then it would nevertheless appear from *Dynamit Actien-Gesellschaft v. Rio Tinto Co.*² that this rule of English law, which is certainly based on public policy, must prevail.³

In *Seligman's* case the receipt of the premium from the surety was regarded by Neville J. as free from objection, and he regarded it as adequate to preserve the policy, but his general statement upon the suspension of the right of an enemy policy-holder contains this important qualification: 'if the policy itself is not made void either at the time when war is declared or at the time when the current year of the policy ran out',⁴ meaning, we suggest, if the premium due is not paid. If in accordance with the foregoing submissions the policy is forfeited and by its terms the policy-holder is entitled upon forfeiture to claim the surrender value, then that sum (or any balance remaining after payment of premiums) must be registered with the Custodian and paid to him.

(e) *Claim not yet accrued. Policy maturing before forfeiture.* If the stipulated event, be it death or some other event upon which the sum insured becomes payable, should occur after the outbreak of war and before the policy has become forfeited, it is submitted that the policy is in force at the time of the event and the policy moneys must be registered with and paid to the Custodian.

(f) *Claim not yet accrued. Annual or other periodical premiums.*

¹ This does not prevent the company after the war from following its ordinary procedure in the matter of the revival of lapsed policies, both as regards payment of arrears and submission of satisfactory evidence of health.

² [1918] A.C. 260, 292; from the speeches delivered in the House of Lords it seems that this would be the case whether the prohibition against receiving payments from the enemy rests on statute or on common law.

³ A rule which prevented the acceptance of periodical premiums and yet preserved the policies would operate unfairly upon insurance companies. It is essential that they should by skilful investment of their premium income be able to make provision for meeting claims when they occur. Take the case of a British insurance company to-day which before the war had issued policies to several hundreds of enemies. The premiums are not being paid. It would be hard on the company to say that they must nevertheless make provision to meet claims and that they will receive the unpaid premiums at the end of the war.

⁴ [1917] 1 Ch. 519, 526 (*italics mine*).

Insurance company enemy. Payment of a premium due to an enemy company by any person resident or being in this country is prohibited both by common law and by section 1 (2) of the Act of 1939, and such payments were not licensed; though the Custodian of Enemy Property was prepared on request to accept such premiums, his acceptance must be regarded as being without prejudice to the effect of the outbreak of war upon the contract. Assuming that the policy contains the usual term providing for automatic discontinuance or forfeiture upon non-payment of the premium, the question arises of the effect of illegality upon the contract. Whether the illegality arises from a statute or from the common law, the effect is the same, for we have seen that 'the force of a declaration of war [or the fact of the outbreak of war] is equal to an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence'.¹ To an action brought after the war by the ex-enemy company against the other party for premiums falling due during the war, this illegality forms a complete defence. But it is difficult to see how the fact that it became illegal to pay the premium can prevent the agreed consequences of non-payment of the premium from operating and thus determining the contract of insurance. If I agree to sell and deliver a horse to a man abroad in consideration of a payment of 100 guineas, and before the horse is shipped a British statute is passed to prohibit the exportation of horses, I have a good defence if sued for breach of contract, but I cannot claim the price.

We suggest therefore that in the circumstances described a policy whose continuance is by its terms dependent upon the annual payment of premiums is forfeited and becomes void upon the failure to pay² the first premium due during the war and is not merely suspended.

As in the converse case, when the stipulated event causing the sum insured to become payable occurs between the date of the outbreak of war and the date when the next premium is due, it is submitted that the policy was then in force. There is no reason why, as in the case of rent accruing due during the war from an enemy tenant, the British policy-holder or his representatives should not be able to sue the enemy company at once if he can effect service upon it.

(g) *Annuities due under pre-war contracts.* When a person who becomes an enemy has before the war bought an annuity from a British company, it can be asserted with safety that the outbreak of war does

¹ Per Willes J. in *Esposito v. Bowden* (1857) 7 El. & Bl. 763, 781.

² By the German Insurance Law of 1908 the company must demand payment, but whether that is the present law I cannot say: see *Levison v. Lebensversicherungsgesellschaft, Leipzig*, *Décisions des Tribunaux arbitraux mixtes*, t. vi (1927), p. 659.

not dissolve the contract, that during the war payments must not be made to the enemy, and that after the war payments must be resumed,¹ unless the annuity is confiscated by the Crown by the appropriate process or in pursuance of legislation or is surrendered by the Peace Treaty.² There remains the question of payments falling due during the war. Scrutton's *Charterparties and Bills of Lading*³ favours the view that these payments are not payable to the ex-enemy after the war. We must confess that, subject to confiscation by the Crown or by legislation or by surrender by the Peace Treaty, we do not see why not. They certainly accrue during the war, and in the recent war would, subject (where the contract so requires) to evidence of the continued existence of the life being available to the satisfaction of the company, have been payable to the Custodian of Enemy Property who could sue the British insurance company for them. We have already discussed⁴ the question of the cessation of interest during the war, but that is different because, if it be that interest does not run during the war, that effect might be justified on the ground that interest ought not to run until payment is overdue. It has been suggested⁵ that possibly dividends accrue during the war (though not payable during the war) to an enemy holder of shares in a British company, and we do not see why payments of an annuity should not be in the same position.

On November 18, 1941, there was some discussion in the House of Commons⁶ regarding the continued payment, under licence, by the London office of the Confederation Life Association of Canada, of an annuity (accruing under a pre-war contract) to Marshal Pétain resident in territory which, though then technically part of 'Unoccupied France', was treated by Order of the Board of Trade made under section 15 (1 A) of the Trading with the Enemy Act, 1939, as enemy-occupied territory. It may be surmised that there were political reasons for licensing these payments.

DEATH BY BRITISH BELLIGERENT ACTION

Quite apart from the previous submissions, the question arises whether a contract of insurance, otherwise valid so far as concerns the effect of war thereon, may become void, either wholly or only in respect of

¹ See Scrutton, *Charterparties and Bills of Lading* (14th ed. 1939), p. 16.

² All of which things might also happen to the annuity of an enemy national who does not become an enemy in the territorial sense.

³ See note 1 above.

⁴ Above, p. 105.

⁵ Above, p. 226.

⁶ Hansard (5th series), House of Commons, vol. 376, col. 182 (November 18, 1941).

certain risks, by reason of its tendency regarded from the point of view of public policy.¹ Let us consider the following cases.

(a) Before the outbreak of the recent war a British insurance company issued to a German national a policy upon his life which covered the risk of death as a combatant. Upon the outbreak of war he is embodied in the German armed forces and, before the next premium has become due, he is killed in action by British forces. Do the marine insurance cases already discussed afford any support for the view that the policy is not enforceable, either during or after the war, on the ground that it would be absurd to allow a British company to pay an indemnity against the consequences of British belligerent action?² We suggest that while there was good reason in the old cases for applying this doctrine to a marine policy, the case for its application to a life policy is not so strong.³ An enemy shipowner or merchant would be encouraged to expose his ship or cargo to the risks of British capture if he knew that he would be indemnified after the war by a British insurance company. The German national is compelled by law to expose himself to the risk of death by enemy action and is unlikely to be affected by the knowledge that a British insurance company will pay the sum insured to his personal representatives. If the German national is a non-combatant and is merely exposed to the risk of incidental and unintentional killing as the result of British aerial bombardment, the case again is not so strong as that of the combatant, as it is not the aim of British belligerent action to kill non-combatants.

(b) Suppose that the policy referred to in (a) was issued not to the German national but to his creditor, a British national in this country. We see no reason why the risk of death by British belligerent action, intentional or unintentional, should become illegal upon the outbreak of war.⁴ The same is probably true where the creditor policy-holder is an enemy national in this country.

¹ In the case of a policy upon the life of, say, Hitler or Mussolini it would be interesting to refer to the well-known case of the wager upon the life of Napoleon Bonaparte: *Gilbert v. Sykes* (1812) 16 East 150. As to the legality of a clause in a policy issued by a British company to a British subject which makes it void if he engages in military service outside the United Kingdom, see *Duckworth v. Scottish Widows Fund* (1917) 33 T.L.R. 430.

² Macgillivray, *op. cit.* p. 281, considers that the risk is illegal and the sum insured irrecoverable.

³ The effect of death resulting from the hostile action of a co-belligerent with Great Britain is probably the same as in the case of death by British belligerent action: see above, p. 240.

⁴ See Macgillivray, *op. cit.*, at pp. 267 and 282.

III. FOREIGN PROCEEDINGS AGAINST BRITISH INSURANCE COMPANIES

(This section applies to Insurance generally.)

It will be convenient to deal here with a contingency which, though not peculiar to British insurance companies, is one to which they are exposed in an unusual degree by reason of the amount of foreign business transacted by them, namely, the possibility of being sued in a foreign country. Their operations in foreign countries may take a variety of forms.

(a) They may cause to be incorporated in a foreign country a company which is, legally speaking, an entirely independent corporation or entity owing its existence to the laws of the foreign country, though its operations may be controlled from the head office in Great Britain.

(b) They may establish in a foreign country a branch office or an agency which is not a separate legal entity but complies with any local law as to registration of particulars and establishment of a place for service of local proceedings, etc.

(c) They may issue from the head office policies containing a clause which gives jurisdiction to a foreign court and authorizes the service of process upon its agents in a foreign country or accepts the law of a foreign country.¹

In any of these cases (a), (b) and (c) a number of questions can arise. What is to happen if the proper law of the contract as applied by the foreign court does not coincide with the law applied by an English Court as to the effect of war upon contracts of insurance, be it abrogation or some other effect?² How far can the British company safely act in reliance upon English law?

These and similar questions can arise in English Courts (and probably also in Scottish Courts, but we cannot profess to speak of them) in two main ways:

- (1) directly in an English action;
- (2) indirectly in an English action brought upon a foreign judgment.

(1) In most of these cases the judgment of the House of Lords in *Dynamit Actien-Gesellschaft v. Rio Tinto Co.*³ will afford an answer.

¹ For an instance of a policy of a foreign company containing a clause stipulating that it should be construed according to English law, see *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 106.

² See Macgillivray, *op. cit.* pp. 290, 291.

³ [1918] A.C. 260, 292.

There their lordships had to consider what they called a 'German contract', a contract made in Germany in the German language by a German agent of the British principal, and containing an arbitration clause, which provided for the appointment of an umpire by the Chamber of Commerce of Frankfort-on-the-Main, and they were prepared to assume for the purposes of the argument, without deciding the point, that the contract must be construed according to German law. They had already held in the *Ertel Bieber* case¹ that a similar pre-war contract made between a British company and an enemy company, which they regarded as an 'English contract', became illegal and void upon the outbreak of war as involving intercourse with the enemy and was not saved by its suspensory clause, which was contrary to English public policy as tending to benefit the enemy and injure Great Britain, and they now had to consider whether, if the 'German contract' was to be construed by German law and if German law differed from English law and would uphold the contract, an English Court would follow suit. In particular, it appears to have been suggested, though no evidence was taken, that by German law the suspensory clause would save the contract from abrogation. The House of Lords held that, whatever the relevant foreign law might say, an English Court could not uphold and enforce a contract which was contrary to English public policy.² There can be no doubt that the rules relating to contracts of insurance with persons who are or become enemies fall within the scope of public policy, and that an insurance policy which is unenforceable, by reason of a state of war, when regarded as governed by English law is equally unenforceable whatever the relevant rules of its proper law may be.

(2) But the enemy may sue the British company in his own country or in a neutral country, either during or after the war, and obtain judgment. If the company has assets there, *cadit quaestio*. If not, the ex-enemy comes here after the war and seeks to enforce his judgment. In what circumstances, if any, will he succeed? The matter must be considered, first, apart from the Foreign Judgments (Reciprocal En-

¹ [1918] A.C. 260, 267.

² Citing Westlake, *Private International Law* (4th ed.), § 215: 'Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law.' Note also once more Willes J. in *Espósito v. Bowden* (1857) 7 El. & Bl. 763, 781: 'The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence', and Lord Alvanley C.J. in *Furtado v. Rogers* (1802) 3 Bos. & P. 191, 198: 'if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract...'

forcement) Act, 1933, and, secondly, under the provisions of that Act. The essential part of Dicey's¹ Rule 114 is as follows:

'Subject to the Exception hereinafter mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

- (1) for a debt, or definite sum of money; and
- (2) final and conclusive;

but not otherwise....'

The Exception is that

'An action cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England.'

Although the authorities cannot be regarded as entirely conclusive, there seems little doubt that an ex-enemy would not be able to enforce in an English court a judgment obtained in such circumstances that the cause of action upon which it was obtained would be unenforceable in England for reasons of illegality or public policy. Powerful authority for this view will be found in the judgments of Fry J. in *Rousillon v. Rousillon*,² of Astbury J. in *Re Macartney*, *Macfarlane v. Macartney*,³ and of Woodruff J. in a New York case, *De Brimont v. Penniman*.⁴ *Re Macartney* is a direct authority, and Astbury J. declined to enforce a Maltese judgment obtained in an action which was 'not only a claim of a character which raises no cause of action in this country, but... its recognition is contrary to public policy'; there were, however, other grounds upon which the foreign judgment was not enforceable. Beale⁵ states the law as follows: 'A valid judgment of a foreign country will not be enforced if an action on the original claim could not have been maintained because contrary to the public policy of the forum.'

In the case of contracts which English law treats as abrogated by the outbreak of war, the ground in some cases, i.e. those contracts whose performance would involve intercourse with the enemy, is sheer illegality, equivalent, as Willes J. has pointed out,⁶ to a crime by statute (and probably also by common law); in other cases, for instance, the invalidity of a suspensory clause as in the *Rio Tinto* cases,⁷ or of a

¹ (5th ed. 1932). See Gutteridge, 'Reciprocity in regard to Foreign Judgments', in *British Year Book of International Law*, xiii (1932), pp. 49-67.

² (1880) 14 Ch.D. 351, 369.

³ [1921] 1 Ch. 522, 527.

⁴ 10 Blatchford's Circuit Reports 436.

⁵ *Conflict of Laws*, § 445, 1.

⁶ Above, p. 276, n. 2.

⁷ [1918] A.C. 260.

restrictive clause as in *Zinc Corporation v. Hirsch*,¹ the effect can more truly be ascribed to public policy.

By the Foreign Judgments (Reciprocal Enforcement) Act, 1933, His Majesty may, if satisfied that substantial reciprocity will be accorded to judgments of the superior courts of the United Kingdom, by Order in Council grant to the judgments of the superior courts of a foreign country the benefits of the Act on certain conditions, and thus render them registrable in the High Court and enforceable by execution in the United Kingdom in the same way as if they were originally English judgments. One of the grounds upon which the judgment debtor may apply for the registration of the judgment to be set aside is (section 4 (1) (a) (v)) 'that the enforcement of the judgment would be contrary to public policy in the country of the registering court'.

Up to date the only countries to which these provisions of the Act have been applied by Order in Council are France and Belgium.

In conclusion, it is necessary to bear in mind the possibility of an enemy policy-holder improving his position by assigning his policy to some person in a foreign country in which the British company has assets.

NOTE

This chapter does not deal with the special code created by the Peace Treaties of 1919-1920 for the settlement of the questions arising under contracts of insurance between former enemies. In the case of the Treaty of Versailles the provisions will be found in the Annex which follows Article 303, particularly clauses 8 to 24. Shortly stated, the Treaty provided (a) that contracts of fire and life insurance between a British insurer and an assured who subsequently became an enemy were not deemed to have been dissolved by the outbreak of war or by the mere fact of the assured becoming an enemy, and (b) that contracts of marine insurance were deemed to have been dissolved unless the risk had already attached before the assured became an enemy, and in that event effect was nevertheless to be given to the contract after the coming into force of the Treaty. It is reasonable to suppose that these provisions embody a recognition of wider national interest than is reflected by the rules of the common law, with which this chapter is primarily concerned. The pre-eminent international reputation of British Insurance is of manifest economic advantage to this country, and one factor which has built up that reputation is the practice of British insurance to afford their overseas policy holders the protection of their local law. In time of war, however, national public policy may prevent British insurers from following this practice. On the other hand, when peace is restored public policy may work the other way. Accordingly, it is not surprising that the Peace Treaties enabled British insurers (subject to the Clearing Office procedure) to give effect to their honourable intentions to fulfil their pre-war obligations under their world-wide contracts as soon as the legal prohibition upon giving effect to those transactions had been removed. See also note 1 on p. 239.

¹ [1916] 1 K.B. 541 (C.A.).

CHAPTER 14

LEASES AND TENANCIES: PARTNERSHIP

LEASES AND TENANCIES¹

The operation of supervening impossibility in the case of leases, conveyances and mortgages has recently been examined by Dr Walford in an article entitled 'Impossibility and Property Law';² and it is proposed here to say very little upon the matter. The doctrine of frustration is predominantly a commercial doctrine and the Courts have so far declined to apply it to covenants in leases and tenancies.³ We have seen⁴ that the law will not allow a party to a contract to allege that it is impossible for him to pay a sum of money, because, to cite again Pollock's quotation from Savigny, 'There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay'. Similarly, when immovable property is involved, the fact that land is indestructible—unlike the buildings which rest upon it—appears to prevent a lessee, when called upon to pay rent or to repair a building in pursuance of his covenants, from pleading the destruction of the building as a defence; much less from pleading that the whole contract has thereby been frustrated.⁵

As regards leases, the following statement of the law may be quoted from paragraph 3 of the Report of the Committee on the Responsibility for the Repair of Premises Damaged by Hostilities:⁶

*'Law in England relating to repairing leasehold property
suffering war damage*

3. The law in England as regards the rights and liabilities of landlord and tenant in the event of the demised premises being destroyed or damaged by or in consequence of hostilities is reasonably clear from the decisions in *Paradine v. Jane* (Ayleyn 26), *Surplice v. Farnsworth*

¹ As to leases made 'for the duration of the war' or in similar terms, see note 3 on p. 6 above.

² 57 L.Q.R. (1941), pp. 339-372.

³ This principle is not yet settled: the *Cricklewood* case [1945] A.C. 221; in *Pelepah Valley (Johore) Rubber Estates Ltd. v. Sungei Besi Mines Ltd.* (1944) 170 L.T. 338, Tucker J. declined to apply the doctrine to a mining lease.

⁴ Above p. 135.

⁵ See Walford, *op. cit.* at pp. 340, 341; at p. 345 he suggests that the reason why the doctrine of frustration does not apply to leases is that lessees are regarded as purchasers of an estate or interest in land and therefore exposed to 'the risk of any calamity which befalls the land or anything upon it'. And see *Eyre v. Johnson* [1946] K.B. 481.

⁶ Cmd. 5934 of 1939.

(7 Man. & G. 576), *Redmond v. Dainton* [1922] 2 K.B. 256 and *Matthey v. Curling* [1922] 2 A.C. 180 (see especially per Lord Atkinson at pp. 233 *et seq.*)¹...

The result of these cases is as follows:

(i) Damage to or destruction of leasehold property by the King's enemies or by the armed forces of the Crown does not relieve the lessee from his obligation to pay rent nor does it relieve either party from his obligation to perform a covenant to repair which will, if the damage is extensive enough to require it, extend to the complete rebuilding of the premises.

(ii) A lessee cannot compel his landlord who has entered into a covenant to repair specifically to perform his covenant nor does failure to repair by a landlord in accordance with his covenant absolve the tenant from liability for rent or entitle him to quit; the tenant, of course, has his action for damages.

(iii) In the absence of a covenant in the lease to repair, there is no obligation on either party to repair or rebuild in the case of damage or destruction by enemy action. This follows from the general rule that in the absence of a covenant the lessor has no obligation to repair and that the tenant's liability with regard to repairs is measured by the doctrine of waste. In no case does waste extend to repairing damage resulting from any cause such as fire or enemy action which is beyond the control of the tenant.²

The matter is now regulated by the Landlord and Tenant (War Damage) Acts, 1939 and 1941. Section 1 of the Act of 1939 relieved persons who are liable under any instrument or oral transaction for doing any repairs in relation to land (which includes buildings or work situated on, over or under land) from any liability to make good any 'war damage', an expression which has since been defined in section 80 of the War Damage Act, 1941. Section 11 of the Landlord and Tenant (War Damage) Amendment Act, 1941, provides (*inter alia*) that 'any express obligation to insure land against war damage shall be void and be deemed always to have been void' and that 'any obligation to insure land against fire or other risks shall be construed³ as not including, and as never having included, an obligation to insure against war damage'.³

The indestructibility of land, coupled with the theoretical identification of buildings upon it with the land itself, might be an adequate reason for not discharging a lease when subsequently it becomes

¹ But see the *Cricklewood* case, *supra*, in which *Matthey v. Curling* is discussed.

² For the meaning, before this Act, of the expression 'loss or damage by fire' occurring in a covenant to insure, when fire is caused by enemy incendiary bombs, see *Enlayde, Ltd. v. Roberts* [1917] 1 Ch. 109.

³ This section is retrospective; *In re Moorgate Estates Ltd.* [1942] 1 Ch. 321.

physically impossible to enjoy the buildings because they are destroyed or rendered uninhabitable. But something more is required to explain the refusal of the Courts to apply the doctrine of frustration to leases. That 'something more' consists of the fact that the legal character of a lease, including even a tenancy agreement, is twofold: it is both a contract and a conveyance: it creates both rights *in personam* and rights *in rem*. In the words of Lush J. in *London and Northern Estates Co. v. Schlesinger*:¹

'It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from personally residing in this flat, it affected the chattel interest which was vested in him by virtue of the agreement.'

The tenancy began before the outbreak of war and was for three years; the event alleged to frustrate the contract was that the premises were situate in a prohibited area, in which the tenant, on becoming an alien enemy, was unable to reside. This decision was followed by Lord Reading C.J. in *Whitehall Court, Ltd. v. Ettlinger*,² where two residential flats (apparently unfurnished) were let after the outbreak of war for a term of three years and were later requisitioned by the War Department. *Matthey v. Curling*³ concerned a pre-war lease for twenty-one years of a house and land of which a Competent Military Authority took possession in January 1918; a year later the house was destroyed by fire. Among the many grounds upon which the Court of Appeal and the House of Lords held that the lessee was not excused from performance of his covenants to pay rent and to repair, approval was expressed of the two earlier decisions. In *Swift v. Macbean*⁴ Birkett J. declined to apply the doctrine of frustration to a pre-war tenancy of a furnished house which was stipulated not to begin unless and until Great Britain became involved in war and to terminate with the cessation of hostilities; the house was requisitioned by the Ministry of Health in March 1941.⁵

The line of distinction between a true demise or letting, as in the cases discussed, and a licence to occupy premises for a brief period, as in *Taylor v. Caldwell*⁶ and *Krell v. Henry*,⁷ is not always easy to draw.

¹ [1916] 1 K.B. 20, 24.

² [1920] 1 K.B. 680.

³ [1922] 2 A.C. 180; see also *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.* [1931] 1 Ch. 274.

⁴ [1942] 1 K.B. 375; see Landlord and Tenant (Requisitioned Land) Act, 1942.

⁵ In the *Cricklewood* case, *supra*, the House of Lords was invited to apply the doctrine of frustration to a building lease for 99 years. It became unnecessary to settle the principle thus raised, and the House was divided upon it.

⁶ (1863) 3 B. & S. 826.

⁷ [1903] 2 K.B. 740.

PARTNERSHIP

Partnership, where one partner is in this country and another in an enemy country¹ (to whom we shall refer as 'the enemy partner'), affords a clear case of abrogation or dissolution by the mere outbreak of war.² In this relationship continuous communication or the opportunity of it is essential, and communication during war, even if feasible, is illegal. It is perhaps unnecessary to add that the conclusion of the war does not effect an automatic resumption of the partnership.

We must consider³ (a) the contract of partnership itself, (b) the agency thereby created, (c) the consequences of the dissolution, (d) the position of the firm as plaintiffs in an English Court, (e) the position in the Prize Court.

(a) *The contract itself.* A decision by Chief Justice Kent in 1818, *Griswold v. Waddington*,⁴ upon a partnership between Henry Waddington, a British subject in London, and Joshua Waddington, an American citizen in New York, existing when the War of 1812 to 1814 between Great Britain and the United States of America broke out, gives a clear lead. Griswold sought to hold Henry liable upon a debt contracted during the war by Joshua. The learned Chief Justice held that the

¹ It is clear that in the case of this contract as in the case of others it is not nationality but place of voluntary residence or of carrying on business that matters (*McConnell v. Hector* (1802) 3 Bos. & P. 113 (three British partners, two in enemy territory); *In re Mary, Duchess of Sutherland, Bechoff, David & Co. v. Bubna and Others* (1915) 31 T.L.R. 248; *ibid.* 394).

² Or equivalent events, see above, p. 86, and *Treasury v. Gundelfinger and Kaunheimer*, South African Law Reports [1919] T.P.D. 329, and *Annual Digest*, 1919-1922, Case No. 280, where the partnership was treated as dissolved when one partner was repatriated to Germany on December 31, 1916.

³ Clearly English law, not the law of the enemy country, must be applied to determine these matters: see an American decision *Rossie v. Garvan* (1921) 274 Fed. 447; *Annual Digest*, 1919-1922, Case No. 281.

⁴ 16 Johnson 438, cited by Chadwick, 20 L.Q.R. (1904) at p. 176. Hyde, ii, § 609, p. 212, n. 1, also cites *The William Bagaley* (1866) 5 Wallace 377, Prize Cases Decided in U.S. Supreme Court (Carnegie Endowment), p. 1699 ('effect of the war was to dissolve the partnership'), *Hanger v. Abbott*, 6 Wallace 532, 535, and *Matthews v. McStea*, 91 U.S. 7. See also *Rossie v. Garvan* (*supra*); *Sutherland v. Mayer* 271 United States 272 (24 May 1926); 1 Federal Reporter (2nd) 419 (reversed).

In *Evans v. Richardson* (1817) 3 Mer. 469, there was a contract made in the United States during the Anglo-American War of 1812-1814, between an American citizen normally resident in his own country and a person who was both a British subject and an American citizen and was normally resident in England, for the exportation of goods from England to the United States 'on their joint account', with the condition: 'provided that a peace should not be likely to take place at the time of shipping the goods'. The case is not important beyond shewing that in the opinion of Lord Eldon L.C. the contract was illegal being 'a contract to defeat the laws of the country' prohibiting trade with the enemy, though in fact the shipment was not made until after peace had been declared.

partnership was dissolved by the outbreak of war, giving two reasons: (1) that partnership involves the reciprocal control by partners of one another's activities, which is impossible during a war which makes them hostile to one another, and (2) the law cannot contemplate an association in which one partner may be engaged in business which is inimical to the interests of the other partner's country and from which the latter partner derives a profit, and 'it would be impossible for the one partner to be engaged in any commercial business which was not auxiliary to the resources and efforts of his country in a maritime war'. This decision was referred to with approval by Willes J. in delivering the judgment of the Court of Exchequer Chamber in *Esposito v. Bowden*.¹

Chadwick,² writing in 1904, summarizes the reasons given, in the decisions and literature then available, for dissolution as follows:

'(1) Owing to the prohibition of all intercourse between the two countries at war, the power of mutual control which enables one partner to check another's dealings is gone.

(2) After the war it is impossible for the partners to pick up the threads of the business at the point where they were abandoned.

[This reason, which is that given by Hall in his *International Law*,³ comes near to Frustration.]

(3) A person should not reap benefit out of his partner's trade in the enemy country; therefore the partnership must be either dissolved or suspended till the restoration of peace, and as the latter is impossible in the case of a partnership it is necessarily dissolved.'

That, briefly, was the situation before the War of 1914 to 1918.⁴ Section 34 of the Partnership Act, 1890, whereby 'A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership' also pointed towards dissolution. Then in 1915 in *R. v. Kupfer*,⁵ where there was in question a partnership between a British subject in London and two British subjects in Frankfurt-am-Main, Lord Reading C.J. assumed

'that the partnership came to an end by operation of law as soon as war was declared. There can be no partnership between enemies of this

¹ (1857) 7 El. & Bl. 763, 784.

² 20 L.Q.R. pp. 167, 176.

³ (8th ed.) (1924), p. 459.

⁴ Lindley on *Partnership* (6th ed.), i, p. 53, inclined to regard partnership as a case of suspension rather than dissolution.

⁵ [1915] 2 K.B. 321, 338. There are several cases in which upon the outbreak of war in 1914 a receiver was appointed in the case of a firm containing an enemy partner but it was not necessary for the court to decide whether or not the outbreak of war *ipso facto* dissolved the partnership, e.g. *Armitage v. Borgmann* (1915) 84 T.L. (Ch.) 784.

country [*scilicet*, in the territorial sense] and a subject of this country when once war has been declared. Commercial intercourse is prohibited, and immediately that prohibition comes into force it is impossible for the relationship of partners to subsist, at any rate during the war.'

And in 1916 in *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie*¹ we find Atkin J. holding that 'the agreement [of partnership] was one which it became illegal to perform after the outbreak of war. It necessarily involved commercial intercourse with an enemy, and could not be fulfilled without such intercourse'. The Court of Appeal² endorsed that view, and the point was admitted in the House of Lords.³

Where there is an enemy partner and more than one non-enemy partner, what is the effect? Is the partnership dissolved as regards all of them or only as between the enemy and the non-enemy partners? It is clear from *Rodriguez v. Speyer Brothers*⁴ that the partnership is dissolved as regards all the partners. This is what principle would demand, as in the case of death or bankruptcy of any partner⁵ unless the articles of partnership contain a contrary provision. It is believed also that it would be lawful to provide in partnership articles that if one partner should become an enemy and thus cease to be a partner, with the result that the partnership is dissolved, it should be renewed and continued between the non-enemy partners—that is, assuming that the effect of the outbreak of the war is merely to make some of the partners enemies in the territorial sense and not to render the object of the partnership or the means of its pursuit unlawful.

The following passage from Lindley on *Partnership*⁶ describes one consequence of war as illustrated in the War of 1914 to 1918:

'During the late war, several cases came before the Courts for the appointment of a receiver in connection with businesses carried on with enemy subjects or by firms with enemy partners in them;⁷ but in cases of this description the ordinary procedure of the Courts was

¹ [1916] 1 K.B. 763, 767.

² [1917] 1 K.B. 842.

³ [1918] A.C. 239.

⁴ [1919] A.C. 59. In *McConnell v. Hector* (1802) 3 Bos. & P. 113, it was held that a firm consisting of three British partners, of whom two were resident and carrying on business in enemy territory, could not sue in an English Court, but the question of the dissolution of the partnership did not arise.

⁵ Section 33 (1) of the Partnership Act, 1890.

⁶ (10th ed.) 1935, p. 637, also referring to the 9th ed., pp. 655, 656.

⁷ Citing *Rombach v. Rombach* [1914] W.N. 423; *Kupfer v. Kupfer* [1915] W.N. 397; *Armitage v. Borgmann* (*supra*); *Re Bechstein* 58 S.J. 863; *In re Gaudig and Blum* (1915) 31 L.T. 153; and *Maxwell v. Grunhut* (1914), *ibid.* 79.

practically superseded by the provisions of the various Trading with the Enemy Acts.'

These Acts provided a practical remedy for most of the difficulties arising in the case of enemy, or mixed enemy and non-enemy, partnerships, by setting up a system of supervision and control, which has already been discussed in the case of Companies¹ and was applied to partnerships in substantially the same manner.

(b) *The agency created by the partnership.* We have already seen² that the reciprocal agency of the partners is terminated by the outbreak of war, so that according to English law neither can thereafter bind the other, which indeed would follow from the dissolution of the partnership. As Swinfen Eady L.J. said in *Hugh Stevenson's* case,³ 'the contract of agency was terminated by the war. It was a trading contract, and war dissolves all contracts which involve trading with the enemy'.

(c) *The consequences of the dissolution.* When we turn to consider the consequences of the dissolution, we pass from contract to property,⁴ and we find that—unless and until the Crown takes the appropriate steps⁵ to bring about a confiscation of the enemy partner's share of the assets—it remains his property and he will be entitled to recover it at the end of the war, subject to any provisions such as those of section 7 of the Trading with the Enemy Act, 1939, whereby it can be vested in the Custodian of Enemy Property, and to any provisions of the Treaty of Peace whereby the enemy partner's Government may surrender his property.⁶ The general principles governing the distribution of assets upon a dissolution of property apply, save that the enemy partner cannot receive anything during the war. In *Hugh Stevenson's* case the right of the enemy partner to receive—after the war—at least his share of the assets as ascertained upon the outbreak of war was not in doubt. But the non-enemy partner continued to use the assets of the partnership, in particular certain machinery, for the purpose of making profits, and the Court of Appeal and the House of Lords held that after the war the enemy partner would be entitled not 'to any share of the profits attributable to the skill or industry of the English

¹ See above, p. 218. There is no reason why section 3A of the Trading with the Enemy Act, 1939, should not be applied to a partnership business.

² Above, p. 206.

³ [1917] 1 K.B. 842, 845.

⁴ See Lord Finlay L.C. in *Hugh Stevenson's* case [1918] A.C. 239, 245: 'The question here is not of contract, but of property.' The decision of the United States Supreme Court in *Sutherland v. Mayer* (*supra*), though the facts are not identical, follows similar lines.

⁵ Above, p. 125.

⁶ Below, p. 391.

partner', but to 'some allowance...in lieu of interest on [the value of the machinery] in respect of the use by the English partner of the German share in the machinery'.¹ If the assets had not been used, or if in spite of their use no profits had been made, the enemy partner would have been entitled to the principal sum due to him upon the outbreak of war together 'with any interest or dividends which had accrued in the meantime'.²

Conversely, the British partner can recover from the enemy partner after the war (or during the war if any recognized form of effective service is possible) the latter's share of liabilities incurred before the outbreak of war and discharged by the former.

(d) *The firm as plaintiffs in an English Court.* We have already seen³ in *Rodriguez v. Speyer Brothers*⁴ that, when the non-enemy partners are seeking to collect by action the assets of the late partnership, the fact that it is necessary to join their late enemy partner does not enable the action to be defeated by the plea of alien enemy.

(e) *The position in the Prize Court.* This matter lies somewhat outside our scope, and it will suffice to refer to three decisions—*The Clan Grant*,⁵ *The Eumaeus*⁶ and *The Anglo-Mexican*.⁷ When the Prize Court is asked to condemn as enemy property the property of a partnership, it is prepared to examine the national character of the partners and to condemn only the shares of the property which belong to persons possessing enemy character. In *The Clan Grant* the Crown, without asking for a decision, expressed its willingness to release the share of a partner who was an enemy national residing in a neutral country. In *The Eumaeus* the Court was prepared to allow the British partners in an enemy firm to give evidence as to the steps taken by them to sever their connexion with the firm upon the outbreak of war. From the decision of the Privy Council in *The Anglo-Mexican* it is clear that the share of a neutral partner in an enemy firm who was resident, and managed a branch of the firm, in a neutral country, would have escaped

¹ At p. 245.

² At p. 244.

³ Above, p. 44.

⁴ [1919] A.C. 59. It seems probable that this decision has overruled *Candilis & Sons v. Victor & Co.* (1916) 33 T.L.R. 20, for it is difficult to see how the point could depend upon the question whether the enemy partners are in a majority or not. *Rodriguez v. Speyer Brothers* was far from finding favour in the *Soufracht* case, [1943] A.C. 203, and we may see judicial attempts to distinguish it when a similar question arises.

⁵ (1915) 1 British and Colonial Prize Cases 272.

⁶ *Ibid.* 605. See also *The Manningtry* [1916] P. 329.

⁷ 3 British and Colonial Prize Cases 24; [1918] A.C. 422. In *The Derfflinger* (No. 3) (1915) 1 British and Colonial Prize Cases 643, the proportionate shares of British partners who had severed all connexion with their enemy partners within a reasonable time were released to them.

condemnation if he had dissociated himself from the firm with sufficient promptitude; his property (in this case a pre-war shipment) was seized and condemned as enemy property taken on board a British ship and thus not protected by the Declaration of Paris.¹ On the other hand, the case of a British partner in an enemy firm is not so clear.

¹ There was also a British partner but he was in Germany when the war broke out and continued to reside there, thus acquiring enemy character, and made no claim to his share of the cargo seized.

CHAPTER 15

SALE OF GOODS

We shall discuss this contract under the following headings:

- (1) Illegality;
- (2) Special position of c.i.f. contracts;
- (3) Effect of governmental action;
- (4) Frustration;
- (5) Suspension clauses; and
- (6) Cancellation clauses;

though we shall find that it is not always possible to disentangle (1) and (3), or (1) and (4), when present in the same case.

(1) ILLEGALITY

At common law it is both criminal and illegal to sell goods to or buy them from an enemy, and under the Trading with the Enemy Act, 1939 (subsection 2 of section 1) 'a person shall be deemed to have traded with the enemy (a) if [*inter alia*] he has (i) supplied any goods to or for the benefit of an enemy,¹ or obtained any goods from an enemy, or traded in, or carried, any goods consigned to or from an enemy or destined for or coming from enemy territory²...'; but 'a person shall not be deemed to have traded with the enemy by reason only that he has... (ii) received payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving payment had already been performed when the payment was received, and had been performed at a time when the person from whom the payment was received was not an enemy'.

A person who is 'deemed to have traded with the enemy' for the purposes of the Act is liable to the penalties prescribed by the Act, and the provisions quoted apply to acts committed during a war in pursuance of a contract made either before or during the war.

A contract which is made during the war and offends either the common law or any statutory provision is illegal and void *ab initio*. A pre-war contract the performance, or further performance, of which

¹ As defined in section 2 of the Act as amended (see above, p. 176). 'Enemy' includes the many hundreds of persons whose names appear on the Statutory Lists issued by the Board of Trade in pursuance of subsection 2 of section 2 of the Act.

² As defined in section 15 of the Act as amended (see above, p. 177).

would offend either the common law or any statutory provision is dissolved upon the outbreak of war, with a reservation of any right of action which may already have accrued from a breach of any of its terms.¹

Sale of goods being the commonest commercial transaction, the War of 1914 to 1918 furnished a multitude of decisions. Any doubt which may have existed as to the effect of the outbreak of war upon the simple case of an executory contract² for the sale of goods wherein one party became an enemy in the territorial sense or some other intercourse with the enemy was involved in its performance, was soon dispelled by early Trading with the Enemy Proclamations. Accordingly most of the reported decisions contain some further element which could be plausibly advanced as a ground for excluding this effect. In April 1915 in *W. Wolf & Sons v. Carr, Parker & Co.*³ the Court of Appeal had no difficulty in holding that pre-war contracts between British vendors and German purchasers resident and having their principal place of business in Germany were abrogated by the outbreak of war;⁴ the only question seriously argued before the Court of Appeal being whether paragraph 6 of the Trading with the Enemy Proclamation No. 2 of September 9, 1914, saved the transaction and enabled the plaintiffs in virtue of their branch at Manchester to sue.

One of the commonest elements which are invoked to avert the dissolution of a contract of sale is a suspension clause. To these clauses we have already referred in the discussion of general principles,⁵ for they also occur in other contracts. We shall refer to them again in section 5 of this chapter, but as they occurred in what is probably the leading group of cases of the War of 1914 to 1918 they must be mentioned at once. During the years preceding 1914 the shadow of war cast a deepening shade upon the commercial community of Europe, and business men sought to diminish the dislocating effects of war by inserting in their contracts clauses providing for the suspension of acts of performance, or at any rate the main acts of performance such as delivery and payment, during war or a war between named countries until the war was concluded, hoping thereby to preserve their contracts

¹ Above, p. 101.

² Upon the meaning of this term, see above, p. 92.

³ (1915) 31 T.L.R. 407. Nor does the appointment by the Board of Trade of a controller to wind up the enemy business revive a dissolved contract: *In re Coutinho Caro & Co.* [1918] 2 Ch. 384.

⁴ It was unnecessary to discuss the effect of war upon certain pre-war breaches of the contracts. In *Jager v. Tolme and Runge* [1916] 1 K.B. 939 (C.A.), the illegality was due to the fact that upon the outbreak of war the subject-matter of the sale was in an enemy port.

⁵ P. 93.

until better days should come. As we have already seen,¹ a group of these cases was reviewed by the House of Lords in three decisions in which the respondents were the *Rio Tinto Co.*, a British company, and the appellants were three German companies, *Ertel Bieber & Co.*, *Dynamit Actien-Gesellschaft*, and *Vereinigte Koenigs and Laurahuette Actien-Gesellschaft fuer Bergbau und Huettenbetrieb*,² the two last being distinguished from the first by the fact that in them the contract was made in Germany in the German language by a German agent of the British company, a distinction which, so it was unsuccessfully argued, made it necessary to apply German law to the contracts with a result differing from that which governed the *Ertel Bieber* case.³

In all three cases there were long-term contracts for the supply of ore by the British company to the German companies over a period of years, such as from February 1911 to November 1914, from February 1915 to November 1919, and from 1912 to 1918, and the contracts contained clauses (similar but not identical) which provided that if, in the event of strikes, war or any other cause over which the sellers had no control, or in all cases of *force majeure* including war, the sellers were prevented from shipping or delivering the ore, the obligation to ship and/or deliver and the corresponding obligation to take delivery should be suspended during the continuance of the impediment and for a reasonable time thereafter or for the duration of the effects of the impediment. The intention was that upon the cessation of the impediment and its effects the obligations should once more attach and performance should be resumed. The House of Lords, considering that the war which broke out between Great Britain and Germany on August 4, 1914, was one of the contemplated impediments, held (briefly) (1) that, even if the suspension clauses were adequate to suspend deliveries, they did not suspend certain other obligations such as arbitration, declaration of quantities and character, which must or might involve the mischief of intercourse with the enemy during the war, and (2) that, even if the suspension clauses were apt to suspend the entire operation of the contracts during the war, and thus exclude all intercourse, they were contrary to public policy and void on the ground that they crippled the trading resources and operations of Great Britain and enhanced the resources of the enemy by ensuring to him after the war the resumption of his supply of raw materials. 'It increases the resources of the enemy, for if the enemy knows that he is

¹ Pp. 93 *et seq.*

² [1918] A.C. 260.

³ Another distinction turned upon the interpretation of the Legal Proceedings against Enemies Act, 1915, which we need not pursue.

contractually sure of getting the supply as soon as the war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realized by means of assignation to neutral countries.¹

The second and third cases raised a point on the Conflict of Laws,² which has already been referred to but may be stated again: even if it were true that the German contracts and the circumstances of their making attracted German law for their interpretation, and even if a German Court would hold that they were not contrary to German public policy, they could not be enforced by an English Court because to do so would be contrary to English rules of public policy. 'It is illegal for a British subject to become bound in a manner which sins against the public policy of the King's realm.'³

Two further questions arise on suspension clauses. (1) It is believed that so far the effect of a suspension clause of this kind has only arisen in the case of contracts one party to which becomes an enemy in the territorial sense upon the outbreak of war. Suppose, however, the case of such a clause in a contract between two British subjects or between a British subject and a friendly alien involving the delivery of goods to an enemy. The mischief is the same, and it is submitted with confidence that the answer is the same. The contract is dissolved.

(2) Again, it is believed that so far the effect of a suspension clause of this kind in a contract for the sale of goods has only arisen where the goods are to be supplied *to* the enemy.⁴ Suppose, however, a contract for goods to be supplied *by* the enemy. It is submitted that the mischief is the same and the answer is the same. To secure to the enemy a post-war market for his goods confers a present benefit upon him and, where the goods are to be delivered in this country, may impose a detriment upon the British trader by tying his hands and preventing him from obtaining the goods in question from another source or upon more advantageous terms during or after the war.

Alternative to illegal performance. Although for the reason stated the Courts decline to give effect to an attempt to save an otherwise dissolved

¹ Per Lord Dunedin [1918] A.C. at p. 275. For comment upon this doctrine, see above, p. 95.

² Above, p. 97. A somewhat similar point arose in an American decision upon the effect of the outbreak of war upon a partnership, though it is not treated from the point of view of Conflict of Laws: *Rossie v. Garvan* (1921) 274 Fed. 447; *Annual Digest*, 1919-1922, Case No. 281: there it was held that it was United States law, not German law, that must be applied to determine the effect of the war on the partnership.

³ Per Lord Dunedin [1918] A.C. at p. 294.

⁴ Or, as in the *Clapham Steamship Co.'s* case [1917] 2 K.B. 639, the use of a ship.

contract by means of a suspension clause, no objection is taken to a stipulation—in a contract neither party to which becomes an enemy—whereby upon the outbreak of war an offending term is cancelled and an innocent term substituted therefor. As Lord Cozens-Hardy M.R. said in *Smith, Coney & Barrett v. Becker, Gray & Co.*:¹ 'Putting it shortly it was this: "I sell you a lot of sugar at Hamburg to be delivered f.o.b. either on board ship or in warehouse, or if by reason of war that cannot be done, I will pay you a sum of cash." What is the difficulty? There is no illegality at all. It is a contract with two branches, two alternatives: "If I cannot deliver you the specific goods I will pay you a sum of cash." On the face of the contract that is its true construction and effect, and there is absolutely nothing in the contention of illegality.' Thus a pre-war contract between British firms for the delivery of sugar f.o.b. Hamburg, which contained a clause cancelling delivery 'in the event of Germany being involved in a war with either England [*sic*], France, Russia and/or Austria' and substituting a Clearing House arrangement whereby the contract was closed at an average quotation calculated in a certain manner, was held to be not illegal, and the substituted money equivalent could be awarded by an arbitrator if upon the true construction of the contract it was due.²

Somewhat similar are the cases of contracts which give to one party the right of choosing one of several modes of performance, e.g. the right, in a contract for the sale of goods, of naming one of several ports of delivery. In *Hindley & Co. v. General Fibre Co.*,³ under a pre-war contract of sale of jute made between two British companies, the buyer had the right to name Hamburg or Bremen or Rotterdam or Antwerp as the port of delivery. The effect of the outbreak of war was to delete from the contract Hamburg and Bremen but not to destroy the contract, because it could still be performed in a lawful manner; the buyer (for some reason not apparent) named Bremen on September 11, 1939; the seller claimed that in consequence of that nomination the contract must be regarded as cancelled, but the Court treated the nomination

¹ [1916] 2 Ch. 86, 92. *Jager v. Tolme and Runge* [1916] 1 K.B. 939 (C.A.) is another Clearing House case.

² *Ibid.* For the case of an unsuccessful attempt by one party after the outbreak of war to substitute a lawful place of performance for an unlawful one, namely, a non-enemy place of delivery of goods for one which had become unlawful by reason of enemy occupation, see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1942] 1 K.B. 12; [1943] A.C. 32, discussed later, p. 293. For an instance of a clause in a charterparty substituting in the event of a war breaking out, a lawful for an unlawful port, see *Avery v. Bowden* (1855) 5 El. & Bl. 714; (1856) 6 El. & Bl. 953.

³ [1940] 2 K.B. 517, much reliance being placed upon *The Teutonia* (1872) L.R. 4 P.C. 171.

as a nullity and allowed the buyer to substitute Antwerp and, the seller having declined to deliver at Antwerp, the buyer recovered damages for breach of contract. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*,¹ there was a contract, made in July 1939, for the supply by an English company of machinery to a Lithuanian company to be delivered c.i.f. at the Polish port of Gdynia in or about October 1939. The Germans having occupied Gdynia on September 23, 1939, the buyers expressed their willingness to take delivery either at Riga or at Leeds. The sellers nevertheless threw up the contract on the ground that as from September 23 performance had become illegal, and an action was brought by the buyers for specific performance and/or damages and for the return of £1000 already paid. Tucker J. and the Court of Appeal held that the obligation to deliver at Gdynia was not a term inserted solely for the benefit of the buyers and capable of being waived by them; that the buyers' claim to be able to substitute another place of delivery had no foundation in law; and that the contract was frustrated, with the consequence, illustrated by *Chandler v. Webster*,² that the loss must lie where it fell and the sum of £1000 could not be recovered. The House of Lords, however, while agreeing that the contract was frustrated, overruled *Chandler v. Webster* and held, for reasons that have already been discussed,³ that the sum of £1000 could be recovered as money paid the consideration for which had wholly failed.⁴

Restrictive covenant in favour of the enemy. So far we have been considering executory contracts of sale which involve positive intercourse with the enemy. There is, however, another, a negative aspect of the matter. A pre-war contract with the enemy may involve no intercourse with him at all, but may help Great Britain's enemy by placing a restriction upon the trading activities of a British subject. In *Zinc Corporation Ltd. v. Hirsch*⁵ a long-term contract resembling those which were present in the *Rio Tinto* cases contained a clause which provided that 'The sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons firm or firms or corporation or corporations other than the [German] buyers'. The Court of Appeal held that, quite apart from the suspension clause, this clause sufficed to vitiate the contract, because it tied the hands

¹ [1942] 1 K.B. 12; [1943] A.C. 32. See now Law Reform (Frustrated Contracts) Act, 1943, above, pp. 158, 169, printed in Appendix II, p. 411.

² [1904] 1 K.B. 493.

³ P. 158.

⁴ Upon the unsuccessful argument in the Court of Appeal that there could be no frustration of a contract containing a clause expressly providing for the contingency which arose, see above, p. 159.

⁵ [1916] 1 K.B. 541.

of a British subject and prevented him from using his resources for the benefit of his country and was therefore contrary to public policy. The decision of the Court of Appeal in this case was approved by the House of Lords in the *Rio Tinto* cases,¹ but as the contracts in those cases did not contain a restrictive clause of the kind quoted above, it cannot be said that the decision was *specifically* approved on this point. There can, however, be no doubt that approval of it is carried by the general principle enunciated in the House of Lords in holding that a contract with an enemy which crippled the trading resources and operations of a British subject to the detriment of his country, is void.

Might not the same point arise in a case like the famous *Nordenfelt* case² if a British vendor of the goodwill of an armament or any other business to a firm which became an enemy had covenanted not to be engaged in a similar business for a period of twenty-five years?

(2) C.I.F. CONTRACTS

We shall do well in the first place to set clearly before ourselves the nature of this contract as stated in 1910 by Hamilton J. (as Lord Sumner then was) in a judgment³ which was supported by the minority judgment of Kennedy L.J. in the Court of Appeal and affirmed by the House of Lords. 'A seller under a contract of sale containing such terms'—that is, a c.i.f. contract—

'has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland v. Livingston*⁴ or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price.'

¹ [1918] A.C. 260.

² [1894] A.C. 535 (Nordenfelt was a Swede).

³ *Biddell Brothers v. E. Clemens Horst & Co.* [1911] 1 K.B. 214, 220 cited by Warrington L.J. [1916] 1 K.B. at 513.

⁴ (1873) L.R. 5 H.L. at 406.

It will be noted that performance of a c.i.f. contract involves the bringing into existence by the seller of two subsidiary contracts, affreightment and insurance.

(a) A pre-war c.i.f. contract between British firms provided for the delivery of goods at Hamburg. The goods were shipped in Chile by a German vessel which was on the high seas when war with Germany broke out. At that moment further performance of the contract became illegal, and the contract was dissolved; the buyers could not call upon the sellers to tender the documents, nor could the sellers call upon the buyers to pay for the goods.¹ A further point was taken for the sellers, namely that 'the seller's only duty was to procure the necessary shipping documents', that is, the bill of lading and the policy of insurance, and if these documents were valid 'at the time when they were procured', it mattered not what happened subsequently and the buyer was bound to accept them. Having regard to the enemy destination of the goods, it was unnecessary to decide this point in this case, but it cropped up again in our next two cases and was settled in favour of the buyer. In these cases² there were pre-war c.i.f. contracts between two pairs of firms who were British (or were treated as British) for the shipment of beans from neutral oriental ports to neutral European ports, Naples and Rotterdam. In both cases the beans were shipped before the war upon German vessels and insured against ordinary marine risks, in one case by an English policy, in the other case by a German policy. No question arose as to the ultimate destination of the goods in either case. Upon the outbreak of war both vessels made their way to ports of refuge. In both cases the sellers tendered the documents to their respective buyers at the appropriate date, namely, three months from dates of bills of lading, but those documents consisted in the one case of a German bill of lading and an English marine policy, in the other of a German bill of lading and a German marine policy. Now the point in which these cases go beyond *Duncan, Fox & Co's* case above discussed is that there the main contract itself, the contract of sale c.i.f., became illegal upon the outbreak of war because the destination was an enemy port; but in these cases it was one or both of the subsidiary contracts, whose existence is essential to performance of a c.i.f. contract, that became illegal. Shortly put, was their continued existence, their continued validity, up to the date of the tender of the documents embodying them essential? The Court of Appeal answered,

¹ *Duncan, Fox & Co. v. Schrempf & Bonke* [1915] 3 K.B. 355 (C.A.).

² *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.; Theodor Schneider & Co. v. Burgett & Newsam* [1915] 2 K.B. 379; [1916] 1 K.B. 495 (C.A.).

Yes, and in consequence the buyer was entitled to refuse to accept the documents and to pay the price. They (or more strictly those relating to the contracts with enemy parties) had ceased to be valid and effective because the contracts embodied in them had been dissolved upon the outbreak of war as regards any future acts of performance. Moreover, the bills of lading were not merely invalid, but to carry out the obligations contained in them, the shipowner being an enemy, would be illegal.

The foregoing are cases where the c.i.f. contract, or one or both of the subsidiary contracts, became illegal upon the outbreak of war. We now come to the case where the effect of the war upon the subsidiary contract of affreightment and by consequence upon the c.i.f. contract itself is to make them not illegal but impossible of performance. In the case of *In re Weis & Co. and Crédit Colonial et Commercial (Antwerp)*,¹ there was no question of the primary or the subsidiary contracts becoming illegal by reason of a party becoming an alien enemy, or of an illegal destination. A cargo on board a British ship, the subject of a c.i.f. contract, for delivery in Antwerp, was afloat when war broke out on August 4, 1914. On some date between the outbreak of war and August 18 the ship was captured on the high seas and taken to Hamburg. On August 18 the seller tendered to the buyer the shipping documents in London but he declined to take them up; at that date Antwerp had not fallen to the German forces and delivery there would have been lawful. Bailhache J. held that 'the fact that it became impossible to perform the contract did not prevent the tender of the documents from being valid', which, it is suggested, means that the seller's obligation under the contract was to tender valid documents, which he did, and the buyer's obligation to accept the documents was not rendered impossible by the capture of the ship.

(b) In the last case Bailhache J. pointed out that the real origin of the buyer's objection to accept the documents when tendered was that the policy of insurance merely covered marine risks and excluded war risks by means of the F.C. and S. clause. How does this question of insurance under a c.i.f. contract stand in relation to war? As we have seen, Lord Sumner spoke of 'an insurance upon the terms current in the trade' as an essential part of performance of a c.i.f. contract. Current at what point of time? At the date of shipment. In several cases it has been held or assumed that in the months preceding the outbreak of war insurance against war risks was not 'current in the trade', but this must always be a question of fact in each case. Moreover, it is

¹ [1916] 1 K.B. 346, 350.

always open to the buyer to supplement his protection against loss or damage by effecting a more comprehensive or different insurance himself.¹

It can thus be said that decisions arising from the War of 1914 to 1918 helped to clarify the nature of the contract c.i.f. by shewing that, while it is not true to say that it is a sale of documents rather than of goods,² it is a sale of goods to be performed by the tender of documents which are proper at the time of the making of the contract and valid and effective at the time when the tender is due—in spite of the fact, notorious when the tender is due, that as a result of enemy action the buyer will not be able to obtain the goods. We do not suggest that this was a new point because the result flows naturally from the nature of the contract, but the war decisions reinforced it.

(c) In connexion with insurance under a c.i.f. contract, war-time decisions have thrown some light upon an obscure section of the Sale of Goods Act, 1893, section 32, subsection 3, which is as follows:

‘Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.’

What does this mean? Bailhache J. said in *Wimble, Sons & Co. v. Rosenberg & Sons*³ that it does not apply to the ordinary contract for the sale of goods f.o.b., but the Court of Appeal (Vaughan Williams and Buckley L.J., Hamilton L.J. dissenting) held that it did.⁴ Hamilton L.J. agreed with the view of Bailhache J. stated above and indicated the class of contract to which, in his opinion, the subsection does apply—neither f.o.b. nor c.i.f. In his judgment Bailhache J. said *obiter*

¹ *C. Groom, Ltd. v. Barber* [1915] 1 K.B. 316, which contains an interpretation of the expression ‘War risk for buyer’s account’ occurring in a c.i.f. contract; there it was held to mean that ‘war risk is the buyer’s concern, and if he wants to cover war risk he must get it done’ (p. 322).

² With regard to the dictum of Scrutton J. on this matter in [1915] 2 K.B. at p. 388, and its subsequent history, see note (z) on p. 780 of the 7th edition of Benjamin on *Sale*.

³ [1913] 1 K.B. 279.

⁴ [1913] 3 K.B. 743 (C.A.)—for reasons which appeared to convince Viscount Reading C.J. in a later case in the Court of Appeal, *Northern Steel and Hardware Co. v. John Batt & Co.* (1917) 33 T.L.R. 516 (C.A.), though it was not open to that court to differ from the decision of the majority in *Wimble, Sons & Co. v. Rosenberg & Sons*. The judgment of Bailhache J. in *Wimble, Sons & Co. v. Rosenberg & Sons* was affirmed because Buckley L.J. held that the obligation upon the seller to give notice to the buyer does not apply to a case in which, as in this case, the buyer had all the information required to enable him to insure.

that it did not apply to c.i.f. contracts nor to contracts 'ex-ship', and in *Law & Bonar v. British American Tobacco Co.*¹ the question of its applicability to c.i.f. contracts was raised directly before Rowlatt J. The goods were consigned from Calcutta to Smyrna on board a British vessel under a bill of lading dated July 20, 1914, and on or about August 13 the British vessel with her cargo was sunk by a German cruiser. The contract being c.i.f., the seller had effected an insurance which was admittedly upon the terms then 'current in the trade', that is, excluding war risks. The buyer refused to accept the documents when tendered and claimed that under section 32 (3) of the Sale of Goods Act he was entitled to notice from the seller to enable him to insure against war risks. Rowlatt J. without saying that the subsection would not 'apply to a contract c.i.f. made at a time when insurances other than those to be provided by the seller—e.g. against war risks—are usual', held that it does not apply to a contract c.i.f. (made May 6 and 7, 1914, in this case) at a time when war is not in contemplation so that it is not customary to insure against war risks, 'because the contract c.i.f. provides for all the insurance that is contemplated or usual and the seller is to effect it'. Accordingly he gave judgment for the sellers. Surely this amounts to saying that it does not apply to a c.i.f. contract at all, because, if it was made at a time when it was customary to insure against war or any other abnormal risks, then a policy against those risks would be 'current in the trade' and the seller would not fulfil his obligations unless he tendered such a policy.

The Court of Appeal followed *Wimble, Sons & Co. v. Rosenberg & Sons* in another case of a contract f.o.b., as indeed they were bound to do, but they held that it did not prevent the particular sellers from recovering as the buyers had sufficient knowledge of the facts to enable them to insure.²

It seems therefore that the subsection which we have been discussing, though originally imported from Scotland, can apply to a contract f.o.b. but from the nature of things, it being customary for the buyer under such a contract to send a ship to fetch them, rarely does; probably does not, it is submitted, apply to a contract c.i.f. or 'ex-ship'; and probably finds its proper sphere of activity in a class of case where 'the seller's obligation to send the goods arises not on the sale itself but only incidentally to it, as part of a simultaneous mandate given by the buyer to the seller'.³

¹ [1916] 2 K.B. 605, 608, 609.

² *Northern Steel & Hardware Co. v. John Batt & Co* (*supra*).

³ Per Hamilton L.J. [1913] 3 K.B. at p. 763.

(3) EFFECT OF GOVERNMENTAL ACTION¹

During war a Government is driven to take action of various kinds which may interfere with the performance of contracts for the sale of goods, notably requisition² and the prohibition or control of exports and imports. In some of the cases to be mentioned the goods forming the subject-matter of the contract were specific, in some they were not. That does not form the basis of a useful distinction, though for obvious reasons it is easier to excuse a contract on the ground of governmental intervention when the goods are specific, but it is not impossible to do so when they are not.

There is no doubt that the intervention of Government has formed an element in a number of admittedly war 'frustration' cases. But it is submitted that McCardie J. was right when he surmised *obiter* in the *Blackburn Bobbin Co.'s* case³ that we ought to place in a separate and independent category cases in which 'British legislation or Government intervention has removed the specific subject-matter of the construction [? contract] from the scope of private obligation', meaning, it is suggested, its permanent removal or its removal for such a time that it cannot become available again for the purposes of the contract. This class of case has a respectable ancestry, *Brewster v. Kitchell*⁴ and *Baily v. De Crespigny*,⁵ and there is no reason why the more modern and more prolific 'frustration' stock should claim it as its own.⁶ We must define the limits of the category. It cannot include all cases of governmental activity.

*Re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration*⁷ may be regarded as typical. There was a sale (during a war) by one British firm to another, of a specific parcel of wheat. Six days later the British Government requisitioned the wheat, apparently under the Army (Supply of Food, Forage and Stores) Act, 1914, which was in force at the date of the sale. The wheat had not been delivered to the purchasers and the property had not passed. The Court, on a special case stated by the arbitrator, held that the seller was excused from performance of the contract. Nothing was said about frustration. Lord

¹ Whether legislative or executive, and whether under statutory or common law powers.

² E.g. Regulation 53 of the Defence (General) Regulations, 1939.

³ [1918] 1 K.B. at pp. 547, 548.

⁴ (1697) 1 Salk. 198.

⁵ (1869) L.R. 4 Q.B. 180.

⁶ In *Kursell v. Timber Operators and Contractors* [1927] 1 K.B. 298 (not a war case) Scrutton L.J. held that a contract for the sale of standing timber was frustrated by the nationalization of the forest by a foreign Government.

⁷ [1915] 3 K.B. 676.

Reading C.J. uses the expression 'and bearing in mind also the principles laid down in *Krell v. Henry*',¹ but *Baily v. De Crespigny* was relied upon and was clearly enough.

In *Lipton v. Ford*,² the seller was required by the Government in pursuance of a Defence of the Realm Regulation 'to place at the disposal of the Army Council 363 tons of raspberries', which was in effect the whole remainder of his growing crop of raspberries, and was thereby prevented from completing delivery under a contract made during the war to sell 'fifty tons Scotch raspberries (Blairgowrie)' to the plaintiff buyer, but they were not specific or required to be the produce of a particular farm and the contract would have been satisfied if the seller had been able to buy raspberries from other Blairgowrie growers, which he could not do. Atkin J., after dealing with a number of other points, including the validity of the requisition, held that its effect was to prevent the seller from disposing of his crop when gathered except to the Government, that but for the requisition he 'would have distributed what raspberries he had after that date [i.e. the date of the requisition] in equal proportions [amongst a number of buyers] towards satisfaction of the amounts undelivered', and that therefore he was excused from delivering to the plaintiff buyer a certain proportion of the amount of raspberries which he was unable to deliver to him. A point which does not appear to have been argued is that the requisition was in fact induced by the buyer who intimated to the Government with whom he had contracted to sell a certain number of tons, that they would not get them unless they exercised their statutory power of requisitioning them.³ In *Dale Steamship Co. v. Northern Steamship Co.*,⁴ it was held by the Court of Appeal that a contract for the sale by one shipowner to another of the skeleton of a steamer in the course of being built was discharged by reason of impossibility when the Admiralty, acting under the Royal prerogative, requisitioned the ship and directed that it should be completed for use in a different way.

Similarly, the *Baily v. De Crespigny* line of authority is adequate to cover not only cases in which the result of the governmental action actually deprives the vendor of his property but also cases in which it becomes illegal for him to 'buy, sell or deal in' the kind of commodity which he has contracted to sell. Thus a Defence of the Realm Regulation, made subsequently to the date of a contract made in London between two British companies for the sale of aluminium (source not specified) and its shipment to Vladivostok, prohibited any dealing in

¹ [1903] 2 K.B. 740.

³ At p. 649.

² [1917] 2 K.B. 647.

⁴ (1918) 34 T.L.R. 271 (C.A.).

aluminium by any person amenable to British law, except by a permit from the British Government which was applied for and refused, and was held to discharge the seller from performance of his contract and to protect him from an action for damages.¹ The aluminium was unascertained, but that is immaterial.

Where, however, governmental action does not have the effect of making performance of the contract illegal (as in the aluminium case) or of removing its subject-matter from the sphere of private obligation (as in *Shipton, Anderson & Co.'s* case), it can only take effect, if at all, as a cause of difficulty amounting to frustration, and it forms an element in frustration in many of the cases discussed in the next section. *Andrew Millar & Co. v. Taylor & Co.*,² already referred to,³ illustrates the importance of not being too precipitate in coming to the conclusion that State action has made it impossible to carry out a contract. A party to a contract before making this allegation and acting upon it must wait for a reasonable time in order to see whether the State interference is brief in its operation or likely to be for all practical purposes permanent.

Invalid governmental action. The effect of voluntary compliance with invalid action by Government is not yet clear. Invalidity may arise: (a) where a regulation or order is *ultra vires* the statute under which it purports to have been made, or (b) where the action of Government is *ultra vires* the Royal prerogative upon which, if upon anything, it must rest, or (c) where, the regulation or order being valid, a purported exercise of the powers thereby conferred is *ultra vires* or otherwise invalid. In *Lipton v. Ford*⁴ the validity of the order of the Government with which the owner of goods complied, and which indeed he invited, was questioned on grounds (a) and (c), but its validity was upheld. In *Russian Bank for Foreign Trade v. Excess Insurance Co.*⁵ ground (c) arose. In that case a Proclamation of August 3, 1914 (apparently made under the Royal prerogative) had given to the Admiralty power to requisition for His Majesty's service any British ship 'within the British Isles or the waters adjacent thereto'. In purported exercise of this power the Admiralty directed the owners of a British ship lying in a Russian port to place her at the disposal of the Russian Government. The ship-owner complied with this purported requisition, and the owner of

¹ *In re Anglo-Russian Merchant Traders and John Batt & Co.'s Arbitration* [1917] 2 K.B. 679 (C.A.). For the other point which arose in this case, see below, p. 302.

² [1916] 1 K.B. 402 (C.A.).

³ Above, p. 163.

⁴ *Supra*.

⁵ [1918] 2 K.B. 123, 131; [1919] 1 K.B. 39 (C.A.).

cargo which was to have been carried by her to England, thereupon claimed against his underwriters, the defendant company, on the ground that there had been a constructive total loss by reason of a 'restraint of princes' within the meaning of his policy. Bailhache J. held that voluntary compliance with an *ultra vires* order of the Admiralty purporting to requisition a ship outside the British Isles and the waters adjacent thereto did not amount to a 'restraint of princes'; 'as disobedience to an *ultra vires* order is not illegal, obedience to such an order, unless compelled by force, or threats of force, is a voluntary act and not a restraint of princes'. This judgment was affirmed by the Court of Appeal on another ground, and Scrutton L.J. inclined to doubt Bailhache J.'s view.¹ It may also be necessary to decide what is the effect of invalid governmental action which is enforced by the use or threat of actual force.

Export and import licences. Many prohibitions of exportation or importation imposed during the war have merely been prohibitions in form and have in substance been the means of regulating exportation or importation by a system of licences or permits. Failure to obtain the necessary licence or permit has frequently given rise to disputes, as it may happen that a seller on a rising market will not display as much zeal in his attempts to obtain a licence from the appropriate Government department as his buyer considers to be due from him.² It is necessary to distinguish between an absolute promise to obtain an export licence and a mere promise to use one's best endeavours to obtain it. In the case of *In re Anglo-Russian Merchant Traders and John Batt & Co.'s Arbitration*³ there was an agreement to sell and deliver abroad aluminium made at a time when to the knowledge of both parties aluminium could only be exported from the United Kingdom under licence from the British Government. The sellers duly applied for an export licence but their application was refused. Upon the assumption that both parties contemplated shipment from this country, were the sellers liable to pay damages for breach of the contract which was in terms absolute and contained no such expression as 'subject to permit being

¹ See below, p. 377, note 3. The point that the requisition was for the benefit of the Russian Government does not appear to have been taken. See *Evans v. Hutton* (1842) 12 L.J. C.P. (N.S.) 17 upon the validity of a prohibition issued by a governmental officer.

² Upon the duty to apply for a licence to exceed a quota, see *Leavey & Co. v. Hirst & Co.* [1943] 2 All E.R. 581.

³ [1917] 2 K.B. 679 (C.A.). See also above, p. 301. Where the refusal of the Government to grant a licence to proceed with building work has been brought about by the action of a party to the contract, he cannot take advantage of the self-induced refusal in order to found upon it a claim that the contract has thereby been frustrated: *Mertens v. Home Freeholds Co.* [1921] 2 K.B. 526 (C.A.).

obtained'? The umpire and Bailhache J. held that the sellers, having entered into a positive contract to ship aluminium and not having stipulated for the event of being unable to obtain a permit, were liable in damages; they had (in the words of the umpire) 'assumed the obligation and risk of obtaining a permit equally with the obligation and risk of obtaining the goods or freight room'. There is a great deal to be said for this view of the obligations of one who enters into a positive contract with his eyes open, but the Court of Appeal took an entirely different line and applied *The Moorcock*;¹ to give 'business efficacy' to the contract it was necessary to imply an obligation that the sellers should use their best endeavours to obtain a permit; they had done so and failed, and therefore there was no breach of contract.² It is not easy to define the limits of *The Moorcock* doctrine, but unless it is applied with care, it may injure the interests of business, 'the essential basis of all trade' being 'the right to rely upon contracts'.³

In the case just discussed the contract could not be carried out unless the licence was obtained. That is different from a case like *McMaster & Co. v. Cox, McEuen & Co.*,⁴ where there was a sale of unascertained jute f.o.b. Dundee, and the buyer intended to export it but was disappointed in his intention because a subsequent official regulation prohibited export without a licence which he applied for but did not receive. There was no contract to sell the goods for export. 'The purchaser had a perfect right when he got them to export them, but that was a right which sprang from his ownership of them and not from any stipulation of the contract.' Therefore his plea of frustration failed. There could be no frustration unless it could be shewn that continued liberty to export was an implied term of the contract.

It is necessary in cases of governmental intervention resting on statute or statutory order to see whether the statute or order contains any provision specifically enabling a contracting party affected thereby to plead the necessity arising from compliance with a direction from the Government or from other governmental action as a defence to any action brought against him for the non-fulfilment of his contract.⁵

¹ (1889) 14 P.D. 64.

² The seller must, however, do his best to obtain any necessary licence; he cannot just do nothing about it, unless he can shew that an application would be futile: *J. W. Taylor & Co. v. Landauer & Co.* (1940) 57 T.L.R. 47. Contrast the case of a licence to communicate with an enemy shareholder: *In re Anglo-International Bank* [1943] Ch. 233, 244.

³ In the words of a witness who gave evidence before the Pre-war Contracts Committee which reported in 1918 (see above, p. 152, n. 6).

⁴ [1921] Session Cases (H.L.) 24; 58 Scottish Law Reporter, p. 70.

⁵ For instance, above, p. 167.

(4) FRUSTRATION

We now come to frustration proper. Amongst other causes of frustration we shall find examples of governmental action which have not been so direct as to remove the subject-matter of the contract from the scope of private obligation. If I agree to build a ship for you, and before it has been delivered the Lords Commissioners of the Admiralty requisition it and direct me to deliver it to them, there is no need to talk about frustration; the ship has been removed from the scope of private obligation, and I am excused. This was clear law long before the doctrine of frustration was even thought of.

In the cases that we are about to consider, sometimes the goods are specific and sometimes unascertained. We shall merely note the fact in passing and discuss the distinction later.¹

*Distington Hematite Iron Co. v. Possehl*² is an early case of a contract of sale in which both illegality and impossibility were present. The goods (pig iron) were unascertained. The duration of the contract was apparently not fixed. The vendors were a British company, the purchasers an enemy firm. The distinction between 'suspension' and dissolution was not at the time so clearly marked as it became later, and Rowlatt J. held, on the impossibility point, that, as the effect of 'suspension' would have been to impose upon the parties a different contract and 'war does not create any contract' the contract is dissolved, 'war having interfered with' its performance. 'To affirm such a contract as standing generally although at the present time it cannot be acted on is not to maintain the original contract but to substitute a different contract for it.'³

In *Andrew Millar & Co. v. Taylor & Co.*,⁴ which has already been referred to,⁵ there was no question of trading with the enemy, and the interfering cause, a Proclamation prohibiting exportation, was temporary and not in the event adequate to create impossibility.

In *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*⁶ there was a pre-war contract between a British company and an Austrian company for the shipment to Austrian ports of 40,000 tons of iron ore and pyrites during 1914 and 1915, and upon the outbreak of war between

¹ For frustration as applied to a c.i.f. contract, see *Comptoir d'Achat, etc. v. Luis de Ridder* [1947] 1 All E.R. 118. ² [1916] 1 K.B. 811.

³ At p. 814. The decision in *Leiston Gas Co. v. Leiston-cum-Sizewell Urban District Council* [1916] 2 K.B. 428, gravely doubted in the *Denny, Mott* case [1944] A.C. 265, is some authority for the undoubtedly correct view that, before frustration can take effect, it must be complete, that is to say, that performance of what still remains possible would amount to performance, not of the original contract, but of an entirely different one; and see *Egham and Staines Electricity Co. v. Egham U.D.C.* [1942] 2 All E.R. 154 (C.A.); [1944] 1 All E.R. 107 (H.L.).

⁴ [1916] 1 K.B. 402 (C.A.).

⁵ P. 163.

Great Britain and Austria in 1914 the contract had been only partly performed. There was enough illegality and to spare to discharge the contract on that ground alone, but McCardie J. made some remarks on frustration upon the assumption that the suspension clause was adequate to cover the case of an Anglo-Austrian war and to suspend not only deliveries but intercourse as well. Even on that supposition he held that the contract was dissolved by frustration. He referred to a variety of frustrating causes:¹ 'supreme administrative intervention' preventing 'any communication between the parties'; 'the position of shipping has wholly changed. Trade rests on a different basis. Prices and freights are uniquely high. At the conclusion of the war new conditions of trade and transport will spring into being.... Can such a set of circumstances have been in the minds of the parties when they made the bargain of February 20, 1912? In my opinion the answer is No....' 'A revolution of circumstances may effect a dissolution of contract.'² The goods were unascertained.

In the case of *In re Badische Co.*³ and other companies, Russell J. had to deal (after the end of the war) with the effect of the outbreak of war upon contracts for the supply of dyestuffs made before the war between British firms and six British registered companies, of which controllers had been appointed under the Trading with the Enemy Acts. These contracts did not 'cross the line of war', but the dyestuffs, sold by sample, were identified by letters and numbers as being the manufactured products of certain concerns in Germany, so that Germany was clearly designated as the source of supply.⁴ Among other grounds for holding the contracts to be dissolved, Russell J. had no difficulty in including frustration.

'The event [he said (at p. 379)] which has happened here is the war between this country and Germany, of long duration, bringing in its train complete stoppage of supplies of dyestuffs from Germany, upheavals in prices, freights and values, dislocation of shipping and commerce, Government restrictions and embargoes, and culminating after the conclusion of hostilities in the passing by the Legislature of this country of an Act (the Dyestuffs (Import Regulation) Act, 1920) prohibiting until the year 1931 the importation into the United Kingdom of all synthetic dyestuffs and intermediate products.'

After referring to Lord Loreburn's speech in *Tamplin's case*⁵ he continued:

'In my opinion, the parties contracted on the footing that peace would

¹ At p. 339.

² At p. 340.

³ [1921] 2 Ch. 331.

⁴ Contrast *Twentsche Overseas Trading Co. v. Uganda Sugar Factory Ltd.* (1945) 114 L.J. (P.C.) 25.

⁵ [1916] 2 A.C. 397.

continue to exist between the country of the contracting parties and the country of the source of supply, and that the source of supply would remain open; and (subject to two other points¹) a term should be implied providing for the dissolution of the contract in the event of war breaking out between those two countries, whereby the source of supply became blocked for an indefinite period of time. That is a term which should be implied so as to give to the contracts the effect which the contracting parties must as business men be deemed to have intended.'

The dyestuffs were unascertained goods.

In *Bolckow, Vaughan & Co. v. Compania Minera de Sierra Minera*² we find a useful instance of what does not amount to frustration. A contract was made in November 1914, after the outbreak of the War of 1914 to 1918, whereby the sellers, a Spanish mining company, undertook to sell and deliver to the plaintiffs at Middlesbrough, 50,000 tons of iron ore during 1915. In the contract there was a suspension clause containing the words 'in the case of war', which was held by the Court not to excuse delivery. The sellers, after delivering between six and seven thousand tons, declined to deliver any more and relied both on the suspension clause and on what was termed 'the doctrine of commercial prevention'. A subsidiary freight contract entered into between the sellers and a Spanish shipping company was held to be valid in spite of considerable dislocation and a rise in freights, and indeed there was no evidence that the shipping company had sought to repudiate it. In fact both the shipping company and the mining company (the sellers) were controlled by the same Spanish concern. In an action by the buyers for damages for breach of contract, Swinfen Eady L.J. said:

'It was urged that the rise in freight, owing to the war, and to the German notice of February 4 proclaiming the waters round Great Britain and Ireland a war region, and to the German submarine attacks, was quite abnormal and far beyond ordinary market fluctuations, and that by "commercial prevention" the defendants were unable to deliver the ore. This can only mean that the defendants would incur a loss in carrying out their contract; but a mere rise in the price of a commodity to be supplied, or in the rate of freight, is not alone a sufficient excuse for non-delivery. A person is not entitled to be excused from the performance of a contract merely because it has become more costly to

¹ The first is that the frustration-term implied was not inconsistent with any express term; the second is the question whether the doctrine applies in the case of 'unascertained goods'—see below, p. 307.

² (1916) 85 L.J. (K.B.) 1776; affirmed (1917) 86 L.J. (K.B.) 439, 444.

perform it. This case has nothing to do with the doctrine of "frustration of an adventure" upon the breaking out of war.'¹

The contract was made during the war.

Application to unascertained goods. It is obvious that a sale of specific goods lends itself more readily to the doctrine of frustration than a sale of unascertained goods. In the first place, in the case of specific goods the attention of both parties is already focused upon the actual subject-matter of the sale, and there is no occasion to speculate as to where the vendor intended to get the goods from and whether that intention was known to the purchaser and formed part of the basis of the contract. *Prima facie* a vendor is free to get the goods from whatever source he chooses, just as a purchaser is free to do what he chooses with them.² In the second place, the weight of the influence of the rules relating to the physical destruction of goods which are the subject of a contract of sale tells against the application of the doctrine to unascertained goods; for instance, section 7 of the Sale of Goods Act, 1893, and *genus nunquam perit*. It is therefore not surprising to find that it was with some reluctance that the doctrine was extended to cover a sale of unascertained goods.

The judgment of McCardie J. in *Blackburn Bobbin Co. v. T. W. Allen & Sons*,³ like so many of his judgments, contains an admirable review of the authorities up to date—February 1918. There was no element of illegality. Both parties were British. The goods were unascertained. He had to deal with a pre-war, wholly executory, contract for the supply of Finland birch timber, free on rail at Hull, for the manufacture of bobbins. He found as facts that the purchasers (plaintiffs suing for damages for breach of contract) "were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull",⁴ and that the vendors

¹ The emphasis is on the words 'upon the breaking out of war'. The learned Lord Justice cannot mean that a contract entered into during a war can never be frustrated by events arising out of a state of war: see, for instance, the *Bank Line* case [1926] A.C. 497.

² *McMaster & Co. v. Cox, McEuen & Co.* [1921] Session Cases (H.L.) 24; 58 Scottish Law Reporter, p. 70; see above, p. 303.

³ [1918] 1 K.B. 540. One of the less well-known authorities referred to is *Ashmore v. Cox* [1899] 1 Q.B. 436, where the goods were apparently unascertained but the decision does not turn upon that point; it was held that a contract, dated April 27, 1898, to ship 250 bales of Manila hemp from ports in the Philippine Islands 'by sailer or sailers... between May 1 and July 31, 1898', was not discharged on the ground of impossibility when the Spanish-American war (which broke out on the 21st or the 24th April) made it impossible to ship the hemp by sailers during the stipulated period. The nationality of the parties is not stated. And see *W. J. Sargant & Son v. Eric Paterson & Co.* (1923) 129 L.T. 471 (occupation of Smyrna, then in Greek hands, by Turkish troops).

⁴ At p. 552.

(defendants) held no stocks in this country. In 1916 it became possible to send Finnish timber by rail across Norway or Sweden, and the vendors offered to supply it at more than double the contract price, contending that 'all pre-war contracts were cancelled by the war'. McCardie J. declined to apply the doctrine of frustration in such a case. He did not say that in no circumstances could it apply to a sale of unascertained goods, but that¹ 'an ordinary and bare contract for the sale of unascertained goods gives no scope for the operation of the *Krell v. Henry*² rule, unless the special facts shew that the parties have clearly (though impliedly) agreed upon a set of circumstances as constituting the contractual basis'. The judgment was upheld by a strong Court of Appeal, Pickford, Bankes and Warrington L.JJ.³ As the last-named said:⁴ 'The normal mode of transport (sea transit from Finland to Hull) was not in fact in the mind and intention of the plaintiffs, and we see no reason for holding that that normal mode must be deemed to have been in their mind and intention.' Bankes L.J.'s brief enumeration⁵ of the alternative tests is interesting.

*In re Arbitration between Thornett & Fehr and Yuills, Ltd.*⁶ is not a war case, but illustrates the difficulty of invoking the doctrine of frustration in the case of unascertained goods. Difficulty having arisen in the performance of a contract for the sale of tallow, the sellers put forward by way of excuse the closing of one of their factories owing to the unprofitable state of trade, the effects of a strike and bad weather conditions interfering with the supply of their raw material.

The Earl of Reading C.J. said:⁷

'I am of opinion that there was no frustration or cancellation of the contract. This was a sale not of specific goods, but of goods of the particular description mentioned in the contract, but which were in fact unascertained under the contract. Once the conclusion is arrived at that the sale was not of specific goods then the mere fact that the company manufacturing the goods did not produce the full quantity of 200 tons is no answer to the claim made by the buyers in this case against the sellers.'

Darling and Acton JJ. concurred.

*In re Badische Co.*⁸ Russell J. had no difficulty in applying the doctrine to unascertained goods.

¹ At p. 551.

² [1903] 2 K.B. 740.

³ [1918] 2 K.B. 467 (C.A.).

⁴ At p. 471; and see *Twentsche Overseas Trading Co. v. Uganda Sugar Factory Ltd.*, *supra*.

⁵ At p. 471.

⁶ [1921] 1 K.B. 219.

⁷ At p. 227.

⁸ [1921] 2 Ch. 331.

'I can see no reason why, given the necessary circumstances to exist, the doctrine should not apply equally to the case of unascertained goods. It is of course obvious from the nature of the contract that the necessary circumstances can only very rarely arise in the case of unascertained goods.'¹

Among the 'necessary circumstances' existing in this case may be mentioned: interruption in obtaining dyestuffs from the named country of supply which became an enemy country, government intervention on a large scale with the trade in dyestuffs in place of unrestricted trade, and the fact that the contracts provided for continuous performance within fixed times, comparatively short.²

The judgment of the Earl of Reading C.J. referred to above was mentioned by Russell J. in the *Badische* case. Having regard (amongst other matters) to the exhaustive manner in which the latter case was argued and considered, the views of Russell J. in so far as they are in conflict with those expressed in the *Thornett and Fehr* case are preferable. When we are considering whether we can imply that the parties would have assented to a particular term had it been brought to their attention at the time of the negotiation of the contract, there is no valid reason for restricting the character of the term. Clearly the burden of proof upon the party asserting such a term is greater when the goods are unascertained than when they are specific, because, when the goods are already specific and within the contemplation of the parties, the focus of their attention is smaller. The scope for the operation of uncertainty is less. But the difference is one of degree rather than of kind.

*Comptoir Commercial Anversoïis v. Power, Son & Co.*³ illustrates the effect which the impossibility of making a secondary contract by one party has upon the primary contract to which he and another person are parties. A sells wheat to B f.o.b. including freight and insurance, and it is well known to B that A, having shipped the wheat, obtained a bill of lading and an insurance policy, and prepared an invoice and drawn a draft upon the buyer of the wheat, will then go to a 'buyer

¹ At p. 382. *Veithardt & Hall v. Rylands Brothers* (1917) 86 L.J. (Ch.) 604; 116 L.T. 706, is not unlike *In re Badische Co.* but rests on the ground that, the agreed source of supply of the unascertained goods being Germany, further performance of the contract between two companies both apparently incorporated and carrying on business in the United Kingdom became illegal as involving intercourse with the enemy.

² For an instance of the effect upon a contract for the supply of paper of a restriction of the importation of paper-making material, see *E. Hulton & Co. v. Chadwick & Taylor, Ltd.* (1918) 34 T.L.R. 230.

³ [1920] 1 K.B. 868.

of exchange' and sell to him the draft with the bill of lading attached. The seller will thus get his money at once instead of waiting until the buyer of the goods receives them and honours the draft. Eight contracts were made between June 23 and July 30, 1914, and when the sellers during the first few days of August 1914 found that they were unable to effect insurance against war risks and were therefore unable to 'sell the exchange', they asked the buyers to arrange payment in New York and upon their refusal to do so cancelled the contracts. In the buyers' action for damages for breach of contract it was pleaded by the sellers (*inter alia*) that the contracts were frustrated by reason of their inability to 'sell the exchange'. Upon a special case stated by the Appeal Committee of the appropriate trade association, Bailhache J. held that there was no frustration, and his judgment was affirmed by the Court of Appeal. It was true that the sellers' intention to 'sell the exchange' (an intention known to the buyers) was defeated, but 'it is necessary that there should be a frustration of the common purpose of the adventure'.¹ The sellers were under no obligation to 'sell the exchange'; the performance of the contract for the sale of the goods was unaffected by the sellers' inability to 'sell the exchange', and just because the parties were aware of the danger of war (as they were) and the sellers' intention to 'sell the exchange' was known to the buyers, the learned judge was not prepared to imply a term to the effect that, if war defeated this intention on the part of the sellers, the contract came to an end. The judgments in this case are valuable as negating the suggestion that, merely because the parties are aware that a certain event will embarrass one of them in the performance of his obligations, the law will therefore impute to them an agreement that, if the event happens, the contract comes to an end.

(5) SUSPENSION CLAUSES

Contracts for the sale of goods and contracts of affreightment are the contracts in which suspension clauses are most frequently found. The effect of these clauses has already been discussed in chapter 4 upon the General Principles of the Effect of War upon Contracts, in chapter 6 upon Frustration and in section 1 of this chapter, and it is unnecessary to say anything more about them here. It may, however, be useful to collect in a footnote² a few of the more important of the many cases

¹ [1920] 1 K.B. at p. 881.

² *Ebbw Vale Steel, Iron & Coal Co. v. Macleod & Co.* (1917) 86 L.J. (K.B.) 689; *Zinc Corporation, Ltd. v. Hirsch* [1916] 1 K.B. 541 (C.A.); *Blythe & Co. v. Richards, Turpin & Co.* (1916) 114 L.T. 753; *Bolckow, Vaughan & Co. v. Compania Minera*

in which they have occurred. The variety of the clauses is infinite. It is perhaps unnecessary to add that the existence of a suspension clause does not preclude the operation of the doctrine of frustration, which may be described as possessing a sort of paramount dissolving power.¹ Indeed, often it is the presence of a suspension clause that attracts the doctrine, namely, when a purely mechanical application of the clause would have, in the light of what has happened, the effect of imposing a new contract upon the parties.

(6) CANCELLATION CLAUSES

Whereas the object of a suspension clause is to preserve the operation of the contract until happier times arrive, the object of a cancellation clause is to enable one party or either party to put an end to the contract and free himself from all further obligation under it. Governmental action is one, but only one, of the many events upon the occurrence of which a cancellation clause may come into play. It is important to remember that when a clause enumerates specific impediments, such as governmental interference, upon the occurrence of which a party has the option of cancelling the contract, what the Court has to do is to construe the clause—not merely to decide what the effect of the impediment would be in the absence of the clause. For instance, if the effect of governmental action is to remove the specific subject-matter of the contract from the sphere of private obligation by requisition, then the contract comes to an end without the action of either party. If, however, the parties have provided in their contract for the effect of the impediment, then the first duty laid upon the Court is to construe the provisions which they have inserted. Clearly the parties cannot avert the consequences of impediments outside their control, but they can—within the limits set by rules of law and public policy—determine what the effect of an impediment upon their mutual rights and duties shall be. It would, however, be a mistake to think that the existence of a cancellation clause precludes the operation of the doctrine of frustration. The dislocation arising may be so great that, even if a party entitled under the clause to give notice of cancellation does not exercise that right, the Court may hold that performance or

de Sierra Minera (1916) 85 L.J. (K.B.) 1776; (1917) 86 L.J. (K.B.) 439; *North-Eastern Steel Co. v. Same* (1917) 86 L.J. (K.B.) 439; *C. S. Wilson & Co. v. Tennants (Lancashire), Ltd.* [1917] A.C. 495; *S. Instone & Co. v. Speeding, Marshall & Co.* (1915) 114 L.T. 370; *Peter Dixon & Sons, Ltd. v. Henderson, Craig & Co.* [1919] 2 K.B. 778; *Ertel Bieber & Co. v. Rio Tinto Co.* [1918] A.C. 260; *Fried Krupp A.G. v. Orconera Iron Ore Co.* (1919) 88 L.J. (Ch.) 304.

¹ Above, pp. 158–161.

further performance of the contract is frustrated so that the contract is dissolved; and frustration operates independently of the election of a party.

An instance of a cancellation clause will be found in *Ford & Sons (Oldham), Ltd. v. Henry Leetham & Sons, Ltd.*¹ where the seller had the option of cancelling a contract for the sale of flour not specific 'in case of prohibition of export, blockade, or hostilities preventing shipment or delivery of wheat to this country'. Later, export was prohibited from twenty-one countries, but remained permissible in the case of three countries which were the principal sources of supply to this country. The price of wheat rose considerably as the result of the prohibition, and the seller made a short delivery, and claimed to cancel the contract. Bailhache J. held that the fact of one or more substantial sources of supply being closed by prohibition of export enabled him to exercise his right of cancellation.²

¹ (1915) 31 T.L.R. 522.

² See also *Scheepvaart Maatschappij Gylsen v. North African Coaling Co.* (1916) 114 L.T. 755; *In re Arbitration between Thornett & Fehr and Yuills, Ltd.* [1921] 1 K.B. 219.

CHAPTER 16

SOLICITOR'S RETAINER

The retainer of a solicitor is a species of the contract of employment, and moreover involves an agency and an intimate and confidential relationship upon which the law in certain circumstances confers a privilege. We should therefore expect it to be governed in general by the principles relevant to agency and employment, upon which something has already been said.¹ It is also something more than a contract, for a solicitor is an officer of the Supreme Court and is subject to the disciplinary control of the Court.

We shall consider the matter under the following headings:

Pre-war retainer.

Position of a solicitor on the record as representing a party who becomes an enemy.

Creation of retainer during war.

PRE-WAR RETAINER

The contract belongs to the category of contracts which involve intercourse between the two parties and it cannot be described as a 'concomitant of the rights of property'. There can be no question but that such a contract between a solicitor in this country and an enemy in the territorial sense (which is the sense in which we are now using the word 'enemy') is abrogated by the outbreak of a war which makes the client an enemy. This would be so, it is submitted,² even if the solicitor's instructions were complete and, so far as could be seen, no further communication with his client would be necessary. That is a mere incident in a particular case and does not alter the fact that the contract belongs to the category of those which involve, or may at any moment involve, communication between the parties,³ just as employment and agency do. As Lord Porter said in *V/O Sovfracht v. N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*:⁴ 'at any moment

¹ Chapters 9 and 12.

² In spite of the facts that the retainer of a solicitor to conduct litigation is an entire contract to conduct the case to an end and that as a matter of law he need not obtain instructions from his client for each step in the action: *Underwood, Son, & Piper v. Lewis* [1894] 2 Q.B. 306.

³ See above, p. 83.

⁴ [1943] A.C. 243, 251, 252, 254.

the necessity (of communication) may arise; the very relationship requires it even if it is desired only to terminate the mandate itself'.

The rule is the same, we submit, whether the solicitor is retained for the purpose of litigation or of non-litigious work. An apparent exception is illustrated by *Tingley v. Müller*,¹ where a power of attorney, irrevocable for a period of twelve months, given to his solicitor by an enemy national resident in England who immediately thereafter left England and was assumed to have arrived a few days later in enemy territory, was held not to have been revoked upon the donor becoming an enemy in the territorial sense. But, as we have suggested,² that decision rests upon the peculiar character under the Conveyancing Acts of an irrevocable power to sell land; and, moreover, the decision would have been the same if the donee of the power had not been the donor's solicitor.

What authority is there—apart from the decisions upon agency and employment already cited—for the submission that the pre-war retainer held by a solicitor from a now enemy client is abrogated upon the outbreak of war?³ We are aware of no positively direct authority.⁴ In *V/O Sovfracht v. N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij*⁵ it was argued in the Court of Appeal that the retainer of the party in the position of a plaintiff, a Dutch shipping company continuing to carry on business in Holland after its occupation by the enemy, and the respondents in these proceedings, was abrogated when that company became enemy within the definition of, and 'for the

¹ [1917] 2 Ch. 144 (C.A.).

² Above, pp. 60, 207. And note the comments made upon *Tingley v. Müller* in the *Sovfracht* case in the House of Lords.

³ The importance of this question to solicitors is obvious from a perusal of such cases as *Yonge v. Toynbee* [1910] 1 K.B. 215; *Simmons v. Liberal Opinion, Ltd.* [1911] 1 K.B. 966; *Fernée v. Gorlitz* [1915] 1 Ch. 177; *D. Glanville & Co. Ltd. v. Lyne* [1942] W.N. 65. See also *Continental Tyre and Rubber Co. v. Daimler Co.* [1915] 1 K.B. 893, 913; [1916] 2 A.C. 307, 337.

⁴ For an instance of an English solicitor's pre-war retainer for the purpose of litigation being dissolved under Article 299 (a) of the Treaty of Versailles, see *Oppenheimer v. Heirs of Oscar Lewy* (1927) *Décisions des Tribunaux Arbitraux Mixtes*, t. 7, p. 418.

⁵ *Supra*. See also *H. P. Drewry S.A.R.L. v. Onassis* (1941) 71 Ll. L. Rep. 179, where the Court of Appeal held that, assuming the claimants in an arbitration, a French company of which a British subject apparently in England was managing director and virtually 'owner', was an enemy within the definition of the Act, two letters from the Trading with the Enemy Branch addressed to the solicitors of the British subject constituted an authority to continue the arbitration notwithstanding the occupation of France. Neither Atkinson J. nor the Court of Appeal dealt with the question whether or not the company became an enemy at common law. This decision requires consideration in the light of the decision of the House of Lords in the *Sovfracht* case.

purposes of', the Trading with the Enemy Act, 1939. Lord Greene M.R., in delivering the judgment of the Court, said:¹

'The result [of the occupation of Holland by the enemy] was that, thereafter, it was illegal for anyone to act for them in proceedings in the courts of this country to recover a business debt or to enforce a business claim....'

The learned Master of the Rolls then referred to the proviso in section 1 (2) of the Act, which says that

'a person shall not be deemed to have traded with the enemy by reason only that he has (i) done anything under an authority given generally or specially by, or by any person authorised on that behalf by, a Secretary of State, the Treasury or the Board of Trade.'

He proceeded to point out that the authority contained in a letter dated May 22, 1940, from the Custodian of Enemy Property to the Dutch company's solicitors, purporting to enable them to continue to act for the company, was an authority which the Custodian had no power to give, so that they had no authority to take further steps in the arbitration.

'The result, in my opinion [he continued]², is that the respondents' application for the appointment of an umpire was one which ought not to have been entertained. It was impossible for anyone to act on behalf of the respondents in the matter of such an application without offending against the Trading with the Enemy Act, 1939.'

In the course, however, of the argument in the Court of Appeal, the hearing was adjourned in order to give the respondents an opportunity of curing the defect in the authority which the Custodian had purported to give to their solicitors, who thereupon obtained two letters from the Trading with the Enemy Branch (Treasury and Board of Trade) and from the Permanent Secretary to the Treasury, apparently authorizing the respondents' solicitors to continue to act for them. The authority therein contained was, in the opinion of the Master of the Rolls,³ 'irregular in one respect, in that it purports to be retrospective so as to cover the action of the respondents' solicitors since May 22, 1940 [the date of the Custodian's letter], a thing which it obviously could not do'. Nevertheless, by the agreement of the appellants' counsel and to avoid a waste of time and money, the authority was accepted *nunc pro tunc* and the proceedings before the Master and Asquith J. were treated by the Court of Appeal as if the giving of the

¹ [1942] 1 K.B. 222, 229.

² At p. 230.

³ At p. 231.

authority had preceded them, with the result that the defect was cured and the authority of the respondents' solicitors was upheld. In view of the fact that the House of Lords held that the respondents were enemies at common law and had therefore no *persona standi in judicio*,¹ it was unnecessary for their Lordships to express a direct opinion upon this ruling by the Court of Appeal, but it is clear from the statements of Lord Wright² and Lord Porter³ that the ruling was not approved. The larger question of the effect of the outbreak of war (or an equivalent event such as the occupation by the enemy of territory in which a litigant is resident), whereby an English solicitor and his client become enemies, is dealt with by these two learned Lords and primarily by Lord Porter, in whose view Viscount Simon L.C. expressly concurred. After referring to the termination of the relation of principal and agent when the parties to it become enemies to one another, as in *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie*,⁴ Lord Porter said:⁵

'It is true that in that instance the agency was a mercantile one, but the prohibition of intercourse with an enemy is not confined to trade, and would therefore apply to a solicitor, who, at any rate in this country, is the mandatory of his principal for the purposes of litigation. This view is in accordance with that expressed by Scrutton L.J. in *Tingley v. Müller*,⁶ and by Lord Sumner in *Rodriguez v. Speyer Brothers*.⁷ If the majority of the Court of Appeal took a contrary view in the former case, with all due respect I am unable to accept their conclusions. Lord Sumner's opinion is not, I think, controverted in this respect by the views of the majority of their Lordships who sat to hear the appeal, nor is it contrary to the grounds upon which their decision was reached.'

It also seems clear from the *Sovfracht* decision that while a solicitor can obtain a licence from the Trading with the Enemy Department under the Trading with the Enemy Act, 1939, to represent an enemy client in English litigation, such a licence cannot redintegrate a retainer once it has been abrogated by the outbreak of war or an equivalent event such as the occupation by the enemy of the territory in which the client is resident. *Esposito v. Bowden*⁸ contains express authority to the

¹ This aspect of the decision has already been discussed above, at pp. 52, 53.

² [1943] A.C. at p. 236.

³ At p. 253.

⁴ [1918] A.C. 239.

⁵ [1943] A.C. at p. 254

⁶ [1917] 2 Ch. 144, 177.

⁷ [1919] A.C. 59, 130.

⁸ (1855) 4 El. & Bl. 963, 975; the same point was argued in the Exchequer Chamber and Lord Campbell's opinion was expressly upheld, though on other grounds the judgment of the Court of Queen's Bench was reversed (1857) 7 El. & Bl. 763, 778. See above, p. 97.

effect that a contract, once dissolved by the outbreak of war on the ground that it involves intercourse with the enemy, cannot be re-integrated, though the formation of a new and identical contract between the parties becomes lawful if licensed by the Crown. It may well be that a new contract may arise by implication from the facts, but that is not reintegration.

SOLICITOR ON THE RECORD AS REPRESENTING A PARTY
WHO BECOMES AN ENEMY

There may, however, be another aspect of the matter. It appears that, though the outbreak of war determines the retainer of a solicitor by a person engaged in litigation who thereupon becomes an enemy, the solicitor remains on the record for certain purposes.¹ In *Eichengruen v. Mond*² the plaintiff had before the war begun what the Court of Appeal considered to be a frivolous and vexatious action; before the outbreak of war which made him an enemy in the territorial sense the statement of claim and the defences had been delivered and he had made certain admissions of fact. After the outbreak of war the defendants applied to have the statement of claim struck out as disclosing no cause of action and to have the action dismissed as frivolous and vexatious, and served their notice of motion upon the enemy plaintiff's solicitors who were still on the record. It appears to have been objected that as the result of the outbreak of war, presumably in revoking the retainer, this was not good and effective service. Lord Greene M.R. disposed of this objection in these words:³

'The outbreak of war has not had the result of removing from the record the name of the solicitors who were acting for the plaintiff, and, indeed, according to the rules and practice of the Court, a solicitor who is once on the record remains on the record notwithstanding that his retainer may be revoked. The only way by which his name can be got off the record is by appointing another solicitor in his place and that solicitor being entered upon the record as the solicitor for the party in person [? 'in question', or some words omitted]. Therefore, according to the rules, the service upon that firm of solicitors was perfectly good and effective service.'

¹ See the following note to Order LXVII, r. 2 in the *Annual Practice*, 1945: '*Solicitor on Record*. Until the judgment in the action has been worked out the solicitor on the record must be taken as between him and the opposite party to represent the client unless the client not only discharges him but substitutes another solicitor on the record....'

² [1940] 1 Ch. 785.

³ At p. 790. As to the solicitor's duty in these circumstances, see bottom of p. 791.

It may have to be considered how far this decision can stand after the speeches in the House of Lords in the *Sovfracht* case referred to above. It should be noted that in *Robinson & Co. v. Continental Insurance Co. of Mannheim*¹ (continuance of a pre-war action against an enemy) it was not suggested that the defendants' solicitors had no power to act for them or that their retainer had been revoked. Whether or not the solicitors obtained a licence from the Crown does not appear. That the defendant enemy has a right to legal representation was expressly asserted by the Court.

CREATION OF RETAINER DURING WAR

We have examined the circumstances in which an enemy in the territorial sense may sue or be sued.² It is abundantly clear, from the numerous cases arising in the past in which an enemy was a defendant and the smaller number in which he was a plaintiff, that when he is allowed to sue or is sued he is entitled to 'all the means and appliances' including representation by solicitor and counsel, open to the ordinary litigant, and cases even occurred during the War of 1914 to 1918 in which consultation with an enemy client in a neutral country was permitted.³ It must, however, be realized that to accept a retainer from an enemy amounts to intercourse with the enemy and the contract between solicitor and client cannot be created without the licence of the Crown. The present practice is for the solicitor to apply to the Trading with the Enemy Department for a licence to communicate with the enemy and to act on his behalf. Such an application usually occurs in the case of litigation but circumstances can be imagined when it might be necessary in non-litigious business, for instance, in regard to patents. It is not the practice for counsel to apply for a licence, and it appears to be assumed that they are covered by the solicitor's licence. The solicitor's licence must not be confused with the Royal licence to sue which must be obtained by an enemy in the territorial sense.⁴

¹ [1915] 1 K.B. 155.

² See chapter 3; *Robinson & Co. v. Continental Insurance Co. of Mannheim* (*supra*); *Porter v. Freudenberg* [1915] 1 K.B. 857, 882, 883; and *The Glenroy* [1943] P. 109, 124.

³ See Scrutton in 34 L.Q.R. (1918) at p. 124.

⁴ See above, p. 189.

CHAPTER 17

EFFECTS OF BELLIGERENT OCCUPATION OF TERRITORY¹

PART I

During a large part of the War of 1939 to 1945 many thousands of square miles of European and Asian territory were under enemy occupation, that is to say, under the occupation of a Power other than, and hostile to, the normal local sovereign. Large portions of British territory, including the Channel Islands, were so occupied. This state of affairs gave rise to a crop of questions which are now being settled by British and other Courts, and it is the object of this and the next chapter to explore this sparsely populated piece of legal territory.² We are not here concerned with the public international law aspects of enemy occupation, but it is necessary to state—very briefly and rather dogmatically—some of the internationally recognized principles because they have some bearing upon questions that can come before national Courts.

The following are the topics we shall discuss:

- A. Summary of public international law.
- B. What amounts to belligerent occupation of territory by the enemy?
- C. Treasonable acts in territory under belligerent occupation.
- D. Birth in territory under belligerent occupation.
- E. Marriage in territory under belligerent occupation.
- F. Effects of acts of the Government of an occupying belligerent, whether:
 - (1) an enemy Government in an international war, or
 - (2) a revolutionary Government in a civil war.
- G. Effects of acts of wholly or partly dispossessed Governments (Chapter 18).

A. SUMMARY OF PUBLIC INTERNATIONAL LAW

International law recognizes three stages which normally occur in the process of conquest: (a) invasion; (b) occupation; and (c) transfer of

¹ Dana in his edition of Wheaton's *International Law* (1866) uses this expression, which is clearly better than 'military occupation', which can occur in time of peace. This chapter is not concerned with the military occupation of foreign territory which may occur in time of peace or in pursuance of an agreement for an armistice. As to the present status of Germany, see note on p. 354.

² See Van Nispen tot Sevenaer, *L'occupation allemande pendant la dernière guerre mondiale* (1946, The Hague).

sovereignty by means of a treaty of cession, or as the result of subjugation without cession. It is believed to be true to say that English law makes the same distinction. We shall see later that, at any rate according to the view of the British Foreign Office and of English Courts, it may become necessary in some cases to interpose between (b) and (c) a stage during which the occupant is something more than a mere belligerent occupant and is exercising *de facto* administrative control, being virtually the sovereign though not yet *de iure*.¹

Occupation is something more than invasion. Oppenheim² defines it as 'invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not.'³

The question whether the whole or a particular part of the territory of a State has been occupied or not is a question of fact, but, once the fact of occupation is established, that fact gives rise to certain legal rights and duties. 'The occupant', says Professor Hyde,⁴ 'enjoys the right and is burdened with the duty to take all the measures within his power to restore and insure public order and safety.'

The most important principle of law incident to belligerent occupation—one that was not established until the last century—is that occupation does not displace or transfer sovereignty. The occupant is entitled to exercise military authority over the territory occupied, but he does not acquire sovereignty unless and until it is ceded to him by a treaty of peace (which is the commonest method), or is simply abandoned in his favour without cession,⁵ or is acquired by him by virtue of subjugation, that is, extermination of the local sovereign and annexation of his territory, as happened in the case of the South African Republic and the Orange Free State at the end of the South African War.⁶ For the same reason, occupation operates no change of

¹ See later, pp. 340–343 and 353, 354.

² Vol. ii, § 167.

³ I suggest that, for the purposes discussed in this chapter, it does not matter whether the belligerent occupation follows an act of submission by the sovereign of the occupied territory (as in the case of France) or a mere laying down of arms by the military commanders (as in the case of Holland—see letter from the Netherlands Foreign Minister to *The Times* of June 20, 1940).

⁴ *International Law*, § 690.

⁵ Upon the peculiar case of the acquisition by Italy of Tripoli and Cyrenaica in 1912, see Oppenheim, ii, § 273. The general proposition above stated is supported by the Privy Council in *The Gerasimo* (1857) 11 Moore P.C. 88, 105, though for reasons discussed later (at p. 324) certain other aspects of that decision are difficult to reconcile with authority.

⁶ A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to receive any recognition; e.g. Germany's claim to have annexed Alsace-Lorraine to the Reich during the recent war.

nationality upon the inhabitants and no transfer of allegiance, though the occupant acquires a right against inhabitants who remain that they should obey his lawful regulations for the administration of the territory and the safety of his forces.¹ The occupant's right and duty of administering the occupied territory are governed by international law. It is definitely a military administration and he has no right to make even temporary changes in the law and the administration of the country except in so far as it may be necessary for the maintenance of order, the safety of his forces and the realization of the legitimate purpose of his occupation.² Article 43 of the 'Hague Regulations' (that is, the Regulations annexed to Hague Convention IV), which were very widely signed and ratified and in this respect may be regarded as declaratory of existing law, obliges the occupant to 'take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.

In so far as the occupant acts within the scope of the authority permitted to him by international law, it is customary for the legitimate government, if and when it reacquires possession of the territory, to recognize his measures and give effect to rights acquired thereunder.³ If the occupant acts unlawfully, his measures will not receive that recognition.⁴ For instance, the German-Belgian Mixed Arbitral Tribunal in 1925, in *City of Antwerp v. Germany*,⁵ declined to give effect to a modification by the German Governor-General of Antwerp of a pre-war Belgian Decree relating to the responsibility of municipalities for acts of violence committed by mobs against persons and property; but the Brussels Court of Appeal in *City of Malines v. Société Centrale pour l'Exploitation de Gaz*⁶ upheld certain necessary measures taken by the

¹ See Hall, pp. 553-585; Hyde, §§ 697-702; and Oppenheim, ii, § 170 and in 33 L.Q.R. (1917), pp. 266-286 and 363-370.

² It is clear from *Porter v. Freudenberg* [1915] 1 K.B. 857, 874, that the C.A. did not doubt that Hague Convention IV is binding upon an English Court.

³ See *The King v. Mg. Hnin* (1946, March 11) in High Court of Judicature, Rangoon, Criminal Revision, as to convictions during the Japanese occupation.

⁴ Upon looting and other wrongful dealings with property, public or private, see the Inter-Allied Declaration of January 5, 1943 (Cmd. 6418), and below, p. 402. And see an important decision by the Court of First Instance of Manila in the Philippines in *Hongkong and Shanghai Banking Corporation v. Perez-Samanillo* on October 14, 1946, where it was held that a compulsory payment by the defendant to a Japanese liquidator of the plaintiff corporation in much depreciated Japanese 'occupation-currency' of the amount of a debt due to the plaintiff in respect of an overdraft was invalid and did not discharge the debt or liberate the security therefor. [To be reported in *Annual Digest*.]

⁵ *Annual Digest*, 1925-1926, Case No. 361. See also *City of Pärnu* case, *ibid.* 1935-1937, Case No. 231, and *Øverland's Case* in Norway, 1943, to be reported in *Annual Digest*.

⁶ *Annual Digest*, 1925-1926, Case No. 362. See Oppenheim, ii, § 169, n. 5, for references to the principal Belgian decisions, and *Legal Problems of Poland after*

German authorities during the occupation which resulted in an increase in the cost of supplying gas due to an increase in the cost of materials and the need of ensuring a supply of gas for the population.¹

Until the War of 1939 to 1945 a long time had elapsed since any British territory was under enemy occupation, though this happened for a short time in the South African War, and we are not aware of English judicial authority in the matter. It is suggested, however, that since the principles stated above have received general recognition and our Courts apply the generally recognized rules of customary international law² except in so far as Great Britain has dissented from them, and since, moreover, Great Britain has ratified the 'Hague Regulations', the principles stated above would in all probability be adopted by our Courts. It is usual for our Courts to give effect to the acts of foreign Governments within the sphere of their competence, subject to certain exceptions such as penal, revenue, and political laws, and provided that those acts do not conflict with the rules of international law.³

The morality or immorality of the occupation is irrelevant. When territory is invaded and held, it must have some kind of government or there will be a state of chaos. The law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be. That the power of the occupant affords unique opportunities for the abuse of the law is patent.⁴

B. WHAT AMOUNTS TO BELLIGERENT OCCUPATION OF TERRITORY BY THE ENEMY?

We must now consider what facts must be present to convert non-enemy territory into enemy-occupied territory for the purposes of English law, and for what purposes English law assimilates territory thus occupied to enemy territory; for example, for the purposes of

¹ Many foreign decisions upon the legality of the legislative and administrative measures of occupants and of judgments given during occupation will be found in the *Annual Digest* for 1919-1922 and succeeding volumes under the title 'Occupation of Enemy Territory'. And see a series of articles on the Liberated Countries in *Journal of Comparative Legislation*, 1947 or 1948, *et seq.*, and Schwenk in 54 *Yale Law Journal* (1945), pp. 393-416.

² For a recent statement of this principle, see Lord Atkin in *Chung Chi Cheung v. The King* [1939] A.C. 160, at p. 168. As to rules created by treaty, see McNair, *Law of Treaties*, chap. II.

³ *Wolff v. Oxholm* (1817) 6 M. & S. 92; *Re Fried Krupp Actien-Gesellschaft* [1917] 2 Ch. 188; and *Re Francke and Rasch* [1918] 1 Ch. 470.

⁴ As to deportations, see Fried in *American Journal of International Law*, vol. 40 (1946), pp. 303-331.

trading with the enemy, the effect of war upon contracts,¹ the plea of alien enemy, and the law of prize. We shall consider these matters under the headings of (a) common law, (b) treaty and (c) statute.

(a) *At common law (including the law of prize)*. The abandonment of the early view already referred to, that belligerent occupation operated to transfer sovereignty, and the apprehension of the distinction between temporary military occupation and permanent conquest, formed a gradual process,² and care must be exercised in reading some of the eighteenth and earlier nineteenth century decisions. In some of them the Court in its desire to point out that belligerent occupation does not transfer sovereignty fails to realize that occupied territory might nevertheless acquire enough enemy character to assimilate it to enemy territory for some of the purposes referred to above.

It is believed that the following statement by Marshall C.J. in the *Thirty Hogsheads of Sugar (Bentzon v. Boyle)*³ correctly represents the common law as understood by English and American Courts:

'Some doubt has been suggested whether Santa Cruz [a Danish island], while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them.'

The 'purpose' in this case was condemnation in prize as enemy property.

The following English decisions, in greater or less degree, discuss the same point:

Bromley v. Hesseltine,⁴ where it was suggested that an insurance by a British subject in 1807 upon a voyage to [neutral] Leghorn then in the occupation of French [enemy] troops was illegal and void, but the evidence did not support the plea.

¹ For an instance in which the belligerent occupation by the enemy of the port of delivery under a contract for the sale of goods produced a frustration of the contract, see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32; see above, p. 158.

² See Oppenheim, ii, § 166.

³ (1815) 9 Cranch 191, 195; Prize Cases in U.S. Supreme Court (*Carnegie Endowment*) 699, now expressly adopted in the House of Lords in *V/O Sovfracht v. N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* [1943] A.C. 203. See also Sir W. Scott in *The Folina* (1814) 1 Dods. 450, where the 'purpose' was purely domestic.

⁴ (1807) 1 Camp. 75.

Blackburne v. Thompson,¹ where, following *The Manilla*² and *The Pelican*,³ it was held by the King's Bench that when insurgents had successfully ousted French authority from certain ports in the French colony of St Domingo and this fact was recognized by British Orders in Council declaring them to be not hostile, those ports became assimilated to neutral ports and it was lawful for British subjects to trade to them.

Mitsui v. Mumford,⁴ where Bailhache J. was prepared to assume that Antwerp after October 9, 1914, became for the time being 'alien enemy territory' and that the common law forbade business intercourse with persons there.

But it would be more correct to say that belligerent occupation by the enemy *prima facie* invests the place occupied with enemy character, and that the Crown may by an Order in Council indicate its intention to treat the place as still having neutral character. Thus in *Hagedorn v. Bell*,⁵ which arose out of the French occupation of Hamburg beginning in 1806, the question arose whether the plaintiff could recover an indemnity upon a policy of marine insurance on behalf of merchants 'domiciled at Hamburg'. Notwithstanding the occupation of Hamburg by a French force 'all the powers of civil government were administered in the same manner as they had formerly been before the arrival of the French'. That Hamburg was, at the time 'when this insurance was effected, under French dominion, and had committed acts to warrant this country to consider her hostile, there can be little doubt' (said Lord Ellenborough C.J. at p. 458). But for reasons of policy the Crown preferred to treat Hamburg as not hostile, and had issued a number of Orders in Council from which it appeared that in the words of Grose J. (at p. 465) 'the trade [with Hamburg] was in some measure made legitimate by this country'. If is for the Crown to decide whether to treat a particular country and its inhabitants as hostile or neutral. Accordingly the plaintiff recovered.

It is difficult to reconcile with these principles the opinion given by the Privy Council in 1857 in *The Gerasimo*,⁶ reversing the decision of Dr Lushington. It is to be noted that the great authority of Marshall C.J. in the *Thirty Hogsheads of Sugar* does not appear to have been brought to the attention of the Privy Council, and it is fair to remark that the

¹ (1812) 15 East 81.

² (1808) Edwards I.

³ (1809) Edwards, Appendix D.

⁴ [1915] 2 K.B. 27. Upon the insurance point see *Campbell v. Evans* (1915) 21 Com. Cas. 357 and *Moore v. Evans* [1918] A.C. 185.

⁵ (1813) 1 M. & S. 450.

⁶ (1857) 11 Moore P.C. 88.

Privy Council in its desire to establish the rule that belligerent occupation does not transfer sovereignty may not have realized that it was compatible with this doctrine that occupied territory might nevertheless acquire enemy character for the purposes of prize and trading with the enemy.

In *Société Anonyme Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency*¹ the Court of Appeal had to consider the position of the plaintiff company, a Belgian company, registered in Antwerp in 1898, at a time (July 1915) when the greater part of Belgium was under German occupation. It was held that Belgium was not as a whole under enemy occupation, and that the plaintiff company was incorporated in Belgium (not Antwerp) and was not an 'enemy' under the Trading with the Enemy Acts and Proclamations then in force.² This is important, though for the purposes of the recent war the matter, as we shall see later, is regulated by legislation and orders thereunder, because neither in the case of Belgium, France or Holland was the whole of the national territory occupied by the enemy. It is submitted that any distinction made by the constitutional law of a country between metropolitan and colonial territory is immaterial for this purpose. Unless the whole territory is occupied, it cannot be said that the country is occupied. Dutch law at any rate recognizes no constitutional distinction between metropolitan and colonial territory.

In the case of *Re Deutsche Bank (London Agency)*³ Russell J. held for the purpose of subsection (3) of section 1 of the Trading with the Enemy Amendment Act, 1916 (which gave priority of payment of unsecured debts to non-enemy over enemy creditors) that a bank, which was a *société anonyme* constituted according to the laws of Belgium, 'notwithstanding the enemy occupation of the greater part of Belgium... was and remained a subject of an Allied Power, and was not an enemy at common law'. But he expressly pointed out (at p. 300) that this was not equivalent to saying that it would have been lawful to trade with this bank during the war.

The common law position has now been examined and authoritatively established by the House of Lords in what seems likely to rank as the most important of the war decisions given in the recent war—*V/O Sovfracht v. N. V. Gebr. Van Udens Scheepvaart en Agentuur*

¹ [1915] 2 Ch. 409.

² See *Central India Mining Co. v. Société Coloniale Anversoise* [1920] 1 K.B. 753 for amending Proclamation issued in consequence of this decision.

³ [1921] 2 Ch. 30, 291. See also *The Leonora* [1919] A.C. 974, where the expression 'enemy origin' occurring in one of the retaliatory Orders in Council is discussed.

Maatschappij.¹ There it became necessary to decide whether the effect of the German occupation of Holland in May 1940 was to convert previously neutral territory into enemy-occupied territory so as to render a shipping company incorporated and domiciled in Holland incapable of continuing in England an arbitration in which it was an actor, by reason of the plea of alien enemy. The question arose upon a summons by the Dutch company for the appointment of an umpire as the result of the refusal of the arbitrator appointed by the other party to proceed with the arbitration upon the ground that the Dutch company had become an alien enemy. The Court of Appeal had held that the Dutch company was not an alien enemy, that is to say, an enemy in the territorial sense, at common law, and that the Trading with the Enemy Act, 1939, which defines 'enemy' 'for the purposes of this Act' does not comprise within those purposes that of settling questions of *persona standi in judicio*. The House of Lords reversed this decision, and held that the Dutch company was, as a result of the enemy occupation, an enemy at common law. The following propositions are laid down by Viscount Simon L.C. (at p. 211):

'1. The test of "enemy character" is fundamentally the same whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law.

2. The test is an objective test, turning on the relation of the enemy Power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment.

3. If the enemy Power invades and forcibly occupies territory outside his own boundaries, residence in that territory may disqualify from bringing or maintaining suit in the King's courts in the like manner as residence in the enemy Power's own territory would. The same applies to a company commercially domiciled or controlled in occupied territory.²

4. But this is not always or absolutely so. It depends on the nature of the occupation and on the facts of each case. If as a result of the occupation the enemy is provisionally in effective control of an area at the material time, and is exercising some kind of government or administration over it, the area acquires "enemy character". Local residents cannot sue in our Courts and goods shipped from such an

¹ *Supra*. Upon the position of a London Bank which had carried on business in what became enemy-occupied territory by means of a separate company, see *Isaacs v. Barclays Ltd. and Barclays Bank (France) Ltd.* [1943] 2 All E.R. 682.

² Unless of course the company has transferred its domicile to another non-enemy country before the hearing of the action (*Owners of M.V. Lubrafal v. Owner of S.S. Pamia* [1943] 1 All E.R. 269).

area have enemy origin—see Marshall C.J. in the *Thirty Hogsheads of Sugar, Bentzon v. Boyle* (1815), 9 Cranch 191, 195. If, on the other hand, the occupation is of a slighter character, for instance, if it is incidental to military operations and does not result in effective control—the case is different, as in *Cremidi v. Powell, The Gerasimo* (1857) 11 Moore P.C. 88. I would adopt the observations of my noble and learned friend Lord Wright on this decision, for I agree that, while Dr Lushington's statement of the law went too far in one direction, Lord Kingsdown (then the Rt Hon. Thomas Pemberton Leigh) in delivering the judgment of the Privy Council, reversing the decision of the Prize Court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind.¹

5. It is not irrelevant to bear in mind the reason why a resident in enemy-occupied territory is in certain circumstances subject to the same disability as a resident in enemy territory. "This law", said Lord Reading C.J. in *Porter v. Freudenberg*,² referring to the denial to alien enemies of a right to sue, "was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts which will be, or may be, to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State". This consideration equally applies to a claim sought to be established in our Courts by a resident in enemy-occupied territory, for if the claimant succeeds, an asset in the form of an award or a judgment is created which the occupying power can appropriate and which is calculated to increase the enemy's resources.

6. The common-law disability to sue in such cases cannot be regarded as got rid of because Emergency Regulations would prevent the transmission abroad of the sum recovered. The asset would be created, even though it necessarily remained here till the end of the war. Such an asset might well operate as security for an advance to the enemy from a neutral lender.

7. The operation of the rule refusing *persona standi in judicio* is always subject to permission being given by royal licence. In the present case, no application for a royal licence has been made.³

¹ See *The Gutenfels* [1916] 2 A.C. 112, discussed below on p. 329. See also *The Achaia* [1916] 2 A.C. 198 (n.). As to the position of Egypt during the War of 1914 to 1918, see also *Commercial and Estates Co. of Egypt v. Ball* (1920) 36 T.L.R. 526.

² [1915] 1 K.B. 857, 867.

³ Viscount Simon L.C. raised the question of a licence in *Fibrosa Spolka Akcyjna v. Fairbairn, etc. Ltd.* [1943] A.C. 32, 35, 40, and the party obtained a licence from the Board of Trade which the House of Lords accepted. Whether it was a licence for the solicitor to communicate with his client or a licence from the Crown for the client to sue does not appear: see above pp. 313–318.

These propositions, professedly only a summary, must be studied in the light of the two exhaustive speeches of Lord Wright and Lord Porter. In particular, attention should be directed to the Lord Chancellor's proposition 4. What amounts to enemy occupation is a question of fact, that is, a question of the interpretation which the law will place upon the facts in a given case. In Lord Wright's words:¹

'This enemy character depends on objective facts, not on feeling or sentiment, or birth, or nationality. They [the inhabitants of enemy-occupied countries] have been described as territorial or technical enemies. Their status is based on residence, or, if they are traders, on what has been called commercial domicile, which has the peculiarity that it may be attached to a trader who is not personally present in the occupied territory, but resides, for example, in a neutral country. He is an enemy *vis-à-vis* the other belligerent in respect of the particular affairs of trade in the occupied or conquered territory which gave him a commercial domicile there. The occupied territory may merely be part of a larger territory which, so far as unoccupied, retains its national character.'

It is true that occupation is a question of fact and of the construction which international law places upon facts. But it must be remembered that 'occupation' is a *terminus technicus* of international law and denotes a state of affairs which, on the one hand, must be distinguished from mere invasion and, on the other, from the rare case of subjugation involving a change of sovereignty without cession by a treaty of peace. There are not two kinds of 'occupation' in the technical sense.

(b) *By treaty.* Articles 1, 30 and 35 of the unratified Declaration of

¹ At p. 229. With great respect I venture to express regret that Lord Wright in his most illuminating survey of the law should have used words so strong as 'subjugation' and 'enemy-subjugated' territory, which to the minds of many may suggest a degree of domination more complete and more permanent than is required to constitute enemy occupation. Moreover, in certain quarters 'subjugation' is used in international law to describe the means of terminating a war by exterminating the enemy as a political society and annexing its territory without any treaty of cession, as, for instance, at the end of the South African War. (Oppenheim, ii (6th ed.), §§ 264, 265.)

The National Socialist rulers of Germany invented new ways of controlling the policy and action of other countries without subjecting them to a formal military occupation, and some day it may be necessary for our Courts to consider whether the German practice of establishing complete and effective domination over professedly neutral countries by insinuating agents and specialist troops into key positions, while permitting their Governments nominally to continue to exercise their functions, as a prelude to plunging them into war, amounts to enemy occupation or not.

London of 1909 may be referred to as assimilating enemy-occupied territory to enemy territory for the purposes of blockade and carriage of contraband. In these provisions it is believed to be declaratory of existing law. For the purposes of Hague Convention VI (Status of Merchant Ships in Enemy Ports) it was held by the Privy Council in *The Gutenfels*¹ that Port Said in 1914, when Great Britain was in military, though not belligerent, occupation of Egypt, was as regards German ships an 'enemy port', quoting (at p. 118) the following passage from Hall with approval: 'When a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil.'

(c) *By statute.* By the Trading with the Enemy Act, 1939,² section 2, the expression 'enemy' means (among other persons) 'any individual resident in enemy territory', and by section 15 (1) 'enemy territory' means 'any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty'.

Subsection (2) of section 15 gives power to a Secretary of State to issue a conclusive certificate as to the fact of any territory being or ceasing to be under the sovereignty or occupation of any Power.³ Further, by subsection (1) of section 2 (as amended by the Defence (Trading with the Enemy) Regulations, 1940) 'enemy' includes

'(c) any body of persons (whether corporate or unincorporate) carrying on business⁴ in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,

(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty, and

(e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business;

¹ [1916] 2 A.C. 112.

² See above, p. 68, upon the expressions 'for the purposes of this Act' and 'in this Act' occurring in this statute.

³ And see S.R. & O. 1943, No. 1034, which provisionally continued the statutory control and restrictions over the property in the United Kingdom of persons or firms resident or carrying on business in any areas occupied by the United Nations or abandoned by the enemy, pending further arrangements.

⁴ *Central India Mining Co. v. Société Coloniale Anversoise* [1920] 1 K.B. 753 contains a useful discussion of the term 'carrying on business'. As to the effect which insurgency in the course of success, though not formally recognized, may have in changing the national character of territory for purposes of trading in time of war, e.g. from hostile to non-hostile territory from the British point of view, see *The Manilla* (1808) Edwards 1; *The Pelican* (1809) Edwards, Appendix D; and *Blackburne v. Thompson* (1812) 15 East 81.

but does not include any individual by reason only that he is an enemy subject'.

Thus mere constitution or incorporation in or under the laws of an enemy-occupied State does not appear to involve enemy character, but control by a person resident in enemy-occupied territory, or in territory assimilated by the Board of Trade to enemy territory, does.

The occupation of France. (a) At common law the effects of belligerent occupation are believed to be coincident with the area of territory occupied. That is to say, if a country is only occupied in part by the enemy, as Belgium was from 1914 to 1918, it is not, for instance, unlawful to trade with persons in the non-occupied area.¹ But it is for our Courts, not for the enemy, to decide whether a particular area is under belligerent occupation or not, and the mere fact that for more than two years it appeared to suit the German Government to describe part of France as non-occupied (perhaps in an attempt to reduce geographically the odium attaching to the occupation and to evade the responsibility of feeding and governing a portion of the population) in no way disentitles an English Court to decide whether the so-called non-occupied France was in fact under enemy occupation or not.² It is clear that the Vichy Government was subordinate to the German Government in the control of the 'non-occupied' area.

But (b) the Legislature has relieved the Courts of answering this question of fact by empowering the Crown to answer it, if indeed express statutory power were required. Subsection (2) of section 15 of the Trading with the Enemy Act, 1939, has already been referred to,³ and the power thus conferred upon a Secretary of State has been supplemented by a new Regulation (S.R. & O. 1940, No. 1214) as follows:

'After subsection (1) of section 15 of the principal Act shall be inserted the following subsection:

(1 A) The Board of Trade may by order direct that the provisions of this Act shall apply in relation to any area specified in the order as they apply in relation to enemy territory, and the said provisions shall apply accordingly.'

¹ See *Blackburne v. Thompson* (*supra*).

² *Donaldson v. Thompson* (1808) 1 Camp. 429 is an unsatisfactory decision and in my opinion does not militate against the rule suggested in the text.

³ Above, p. 329. On the subject of credit balances due to British subjects in enemy-occupied territory from local branches or subsidiaries of British banks, and their recoverability in England, see a debate in the House of Lords on July 16, 1940 (Hansard, vol. 116, No. 72), *Clare & Co. v. Dresdner Bank* [1915] 2 K.B. 576, and *Richardson v. Richardson* [1927] P. 228.

In pursuance of this power the Board of Trade by Order dated July 10, 1940 (S.R. & O. 1940, No. 1219) applied the provisions of the Trading with the Enemy Act, 1939, to 'those parts of metropolitan France which are not included in the area occupied by Germany in accordance with the terms of the Franco-German Armistice Convention of June 22, 1940. Algeria. The French Zone of Morocco. Tunisia'. Later Orders applied the same Act to Monaco and French Somaliland and to other countries. From time to time these Orders have been revised or withdrawn.¹

Title by succession. Although in this chapter we are concerned primarily with the rights and duties of private individuals as affected by occupation, it is worth while referring to the principle laid down by our Courts in giving effect to the international rights and liabilities of a Government (or, frequently, a State) which 'succeeds to any other government, whether by revolution or restoration, conquest or reconquest' (which includes the successful termination of a belligerent occupation). In *United States of America v. McRae*,² Sir W. M. James V.-C. had to consider a claim by that country against an agent of the suppressed Confederate Government for an account of his dealings in respect of a Confederate loan raised in this country. He said:

'I apprehend it to be the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be

¹ There are at least three ways in which the Crown may declare territory to have been occupied by the enemy—notification by the Foreign Office or by the Trading with the Enemy Department or an Order by the Board of Trade under section 15 (1A) of the Trading with the Enemy Act, 1939.

² (1869) L.R. 8 Eq. 69, 75.

enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.'

It is important to note that in the opinion of the learned Vice-Chancellor the principle would be the same if the rebellion had occurred on British territory, for he said (at p. 74) that he proposed to deal with the case

'as if the plaintiffs instead of being a foreign State had been the Government of India, and as if the defendant had been the agent of the persons who for several months had possession of the city of Lucknow and the surrounding territory of Oude, and assumed to exercise the rights of sovereignty there until their rebellion was finally suppressed by Lord Clyde.'

An instance of succession to public property on conquest will be found in *Haile Selassie v. Cable and Wireless, Ltd.* (No. 2)¹ once that case had reached the stage at which the Foreign Office certified that the United Kingdom Government recognized the King of Italy as *de iure* sovereign of Ethiopia and no longer recognized the Emperor Haile Selassie in that capacity.

C. TREASONABLE ACTS IN TERRITORY UNDER BELLIGERENT OCCUPATION

We are not dealing with treason *vis-à-vis* the occupant, because, of course, the inhabitants of occupied territory owe the occupant no allegiance² (unless indeed they are his subjects) and can therefore not be guilty of treason. But can the inhabitants of the occupied territory

¹ [1939] Ch. 182. In the same case Bennett J. (at p. 189), at a time when the United Kingdom Government, while still recognizing the plaintiff as the *de iure* Emperor of Ethiopia, recognized the Italian Government as the Government *de facto* of virtually the whole of Ethiopia, declined to accept the passage quoted above from *United States of America v. McRae* as authority for the proposition that the debt due from the defendants to the plaintiff had vested in the Kingdom of Italy. This was clearly right, for in *United States of America v. McRae* there was no question of two claimants, one a *de iure* sovereign and the other a *de facto* sovereign. Moreover, there is no reason why the fact that the Italian Government was the Government *de facto* of even the whole of Ethiopia should affect the property of the State of Ethiopia situated in England. Contrast *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. 513 (see later, p. 340), where the decree in question purported to operate in Ethiopia.

² Nevertheless the inhabitants do owe a kind of *de facto* obedience to the regulations which international law permits the occupant to make. See Oppenheim, ii, § 170, and in 33 *L.Q.R.* (1917), pp. 266-286 and 363-370. For the meaning of 'War Treason' see Oppenheim, ii, §§ 162 and 255.

be guilty of treason towards the dispossessed sovereign and be subsequently punished if and when he recovers possession of the territory? So far as our law is concerned, British subjects in British territory under enemy occupation continue, by virtue of their personal allegiance to the Crown, to be amenable to the law of treason, and non-British subjects, whether enemy or otherwise, who were resident before the occupation and therefore owed the Crown local and temporary allegiance, continue to do so, in spite of the occupation. Thus a citizen of the South African Republic resident in Natal who joined the forces of that Republic in 1899 when they invaded and occupied the part of Natal in which he had resided for ten years, was adjudged guilty of high treason and his conviction was later upheld by the Privy Council. It having been contended that his allegiance ceased when the Queen's protection ceased, Lord Loreburn L.C., in delivering the opinion of the Privy Council, said:¹

'The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time being exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled.'

D. BIRTH IN TERRITORY UNDER BELLIGERENT OCCUPATION

There appears to be general agreement among British text-writers upon the two following propositions:

(a) *That birth in British territory under enemy occupation confers British nationality iure soli, unless the father is an alien enemy.*² Such a person is 'born within His Majesty's dominions and allegiance' within the meaning of section 1 (1) (a) of the British Nationality and Status of Aliens Act, 1914, as amended in 1918, 1922 and 1943, presumably because the hostile occupation has not displaced His Majesty's sovereignty. But when the father is an alien enemy the allegiance is considered not

¹ *De Jager v. Attorney-General of Natal* [1907] A.C. 326, 328. The occupation lasted for six months and appears to have amounted to more than mere invasion. For an adverse criticism see Baty in *Law Magazine and Review*, xxxiii (1908), pp. 214-218.

² If the child is illegitimate, I suggest that the father's nationality is immaterial.

to exist and the child is not British-born. Dicey¹ cites a passage from *Calvin's case*:² 'if enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience'. Dicey would apply the same rule to the children of any alien enemy whether he is part of the occupying force or not, but not to the children of an alien *ami*. The extritoriality of the army of occupation would suffice to exclude from British nationality the children of members of the occupying forces. We suggest that it is probable that the child born during the occupation in Jersey whose father is a French farmer, or a German waiter, who was there when the occupation took place, is British.

Can we test the matter by supposing one of the Scilly Isles (in order to get rid of Jersey law) to be under enemy occupation and enquiring whether after the end of the occupation a French citizen or a German subject who was there before the occupation could be convicted of treason in respect of an act committed there during the occupation? He was until the occupation *sub protectione regis* and owed allegiance, of a kind known as local and temporary, to the King. Did the occupation determine that allegiance? The opinion of the Privy Council in *De Jager v. Attorney-General for Natal*³ says, No. The King's protection is merely in suspense. If the alien enemy father was not resident in the occupied territory before the occupation but came to it with his wife during the occupation, it is arguable, and indeed probable, that his child born there is not British, because the father was never *sub protectione regis*.⁴

(b) *That birth in non-British territory, whether enemy, allied or neutral, under British occupation, would not confer British nationality iure soli.*

¹ Rule 22, Exception 2; Westlake, *Private International Law*, § 280. Cockburn, *Nationality*, p. 7, excluded from British nationality 'a child born to a foreigner during hostile occupation of any part of the territories of England'. The American Courts have adopted our rule: see Hyde, *International Law*, § 343, citing *United States v. Wong Kim Ark* (1898) 169 U.S. 649, 656, and *Inglis v. Sailor's Snug Harbour* (1830) 3 Pet. 99, 155-156, 164. I think that the view of the effect of occupation upon sovereignty expressed by Story J. in the latter case would not be accepted to-day. Anything occurring in Coke's Reports, however *obiter* it may be (and no one enjoyed *obiter* diversions so much), is regarded almost as gospel. If and when a modern Court has to consider what weight is due to this passage, it will be necessary to remember that a statement of law must be construed in the light of the legal ideas then prevailing and conditioning it. Three hundred years ago the distinction between the legal effects of temporary belligerent occupation and of permanent conquest respectively was not appreciated.

² *Calvin's case* (1608) 18a, 18b. Note the words 'come into'.

³ Above, p. 333.

Supposing the father to be a British subject at the time of the birth, such a child would be a British natural-born subject *iure sanguinis*, if in addition the father fulfilled any of the conditions required by paragraph (b) of subsection (1) of section 1 of the British Nationality and Status of Aliens Act, 1914, as amended in 1918, 1922 and 1943. (It is difficult to see how the new subsection 1 of section 2 of the Act of 1943, registration of the birth at a British consulate, could apply to this case.) Supposing his father was not a British subject who fulfilled one of these conditions, we do not consider that the child would acquire British nationality *iure soli*: not, even, it is submitted, if his mother were a member of the forces of the Crown serving in the occupied territory, because British nationality cannot be inherited through a woman; nor even, it is submitted, if the child were born within the lines of the Army. A British army on foreign soil is extraterritorial in the sense that the local foreign jurisdiction is excluded,¹ but that does not mean that the territory occupied by it is deemed to be British territory.

E. MARRIAGE IN TERRITORY UNDER BELLIGERENT OCCUPATION

(a) *Where Great Britain is the occupant.* Section 2 of the Foreign Marriage Act, 1947, replacing Section 22 of the Foreign Marriage Act, 1892, provides, in subsection 1, that:

“(1) A marriage solemnised in any foreign territory [as defined in subsections 2 and 3] by a chaplain serving with any part of the naval, military or air forces of His Majesty serving in that territory or by a person authorised, either generally or in respect of the particular marriage, by the commanding officer of any part of those forces serving in that territory shall, subject as hereinafter provided, be as valid in law as if the marriage had been solemnised in the United Kingdom with a due observance of all forms required by law.”...

The Act of 1947 amends the Act of 1892 in several respects. No special form of marriage is required by the section.² One at least of the parties to the marriage must be a member of His Majesty's forces or a person employed in the foreign territory in such other capacity as may be prescribed by Order in Council. ‘Foreign territory’ means territory other than (a) any part of His Majesty's dominions, or (b) a protectorate, or (c) any other territory under the protection or suzerainty or jurisdiction of His Majesty, and includes ships in the waters of such foreign territory. The section appears to apply whether the British forces are in peaceful or belligerent occupation of the foreign territory

and to cover them in Germany to-day. Hall says that, since an army has no extraterritoriality as against its enemy, it would be too much to expect the local Courts to recognize such a marriage after the end of a belligerent occupation unless it happened also to satisfy the requirements of the local law.¹

By reason of section 23 of the Act of 1892, it is possible that a marriage *per verba de praesenti* before a clergyman of the Church of England or a priest of the Church of Rome, such as was valid before the Marriage Act of 1753, taking place within the lines of a British army serving abroad is still valid, and this rule does not seem to be confined to the members of a British army nor to the case of a belligerent occupation.²

(b) *Where British territory is occupied.* It is believed that principle requires us to regard a change made in the marriage law by the occupant as outside his competence and invalid, and that a marriage celebrated in accordance with the (British) local form, the other conditions of the validity of a marriage being satisfied, would be valid.³

F. EFFECTS OF ACTS OF THE GOVERNMENT OF AN OCCUPYING BELLIGERENT

We shall now consider in their municipal aspect the effects of acts (legislative, executive and judicial) of the Government of an occupying belligerent, whether

- (1) an enemy Government in an international war, or
- (2) a revolutionary Government in a civil war.

I. *Effects of Acts of Government of Enemy Occupant in an International War*

By this expression is intended an occupant who is enemy to the local sovereign, whether he be enemy to Great Britain or not. Whether the territory under occupation is British or belongs to a co-belligerent

¹ *Loc. cit.*, writing of section 22 of the Act of 1892.

² *R. v. Brampton* (1808) 10 East 282 (a settlement case, marriage of a soldier, British occupation of San Domingo in 1796); *Burn v. Farrar* (1819) 2 Hagg. Con. 369; *Waldegrave Peerage* case (1837) 4 Cl. & F. 649 (marriage of an officer within the lines of the army abroad); Dicey, Rule 182 and comment.

³ See a German decision, *Annual Digest*, 1923-1924, Case No. 237: German member of the army of occupation in Russian Poland in 1917 marries a Russian woman, both Catholics. Marriage was valid according to Russian law. On the husband's petition for a declaration of nullity on the ground that it did not accord with the form prescribed by German law it was held by the German Supreme Court in 1924 that the occupied territory must be regarded as foreign territory to which German law does not apply and that the marriage was valid. See also a decision of the Supreme Court of Hungary, *ibid.* 1935-1937, Case No. 232, summarized in a note on p. 336 below.

with Great Britain or Great Britain is neutral, the principle is that, the occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits¹ will be recognized by the British Government and by British Courts of law—during and after the war if Great Britain is neutral,² after it if Great Britain is belligerent.³ It must be admitted that it is not easy to find British judicial authority for this proposition, for it is only when British territory is under enemy occupation that these questions are likely to arise in British Courts, and that does not often happen. But the following statement by a writer (W. E. Hall) who has always been regarded as most characteristically British and positivist in his exposition of international law, is strong authority. Speaking of the right of *postliminium*, he says:⁴

‘Thus judicial acts done under [the control of the occupant], when they are not of a political complexion, administrative acts so done, to

¹ *Ochoa v. Fernandez*, 230 U.S. 139 (an American case arising out of the occupation of Porto Rico).

² In recent practice neutrality is ceasing to be the well-defined institution that it formerly was, and a new jargon, e.g. ‘pre-belligerency’, ‘non-belligerency’, etc., is becoming popular. These terms are political, not legal, but in view of the fact that in Great Britain, the United States of America and some other countries, the Courts of law look to the Executive for guidance as to the character of our foreign relations with a particular country, the political sympathies expressed in terms such as those referred to above may be reflected in the answers given by the Executive to the Courts. Thus in relation to the decrees of the German Government during occupation of Holland we find Mr Justice Pecora of the Supreme Court of New York, in *Amstelbank N.V. v. Guaranty Trust Co.* (1941) 31 N.Y. Supp. (2nd) 194, 199, saying, before the U.S.A. entered the war: ‘The Government of the United States has refused to recognize the German military control of Holland. Any decrees by this unrecognized occupying force would not have “force and effect of mandates of a lawful sovereign.” . . . In withholding recognition of the Nazi regime in continental Netherlands, the Government of the United States has made a determination of policy which our courts should follow. Therefore, any German decrees promulgated in the Netherlands should be given no force or effect whatever in the determination of questions involving property in this State’: cited by Jessup in *American Journal of International Law*, xxxvi (1942), p. 286, and see to the same effect *Koninklijke Lederfabriek ‘Oisterwijk’ N.V. v. Chase National Bank*, 177 Misc. 186; affirmed New York L.J., December 20, 1941, p. 2070. It would be difficult to apply this policy to ordinary and lawful routine acts involved in the administration of occupied territory.

³ It should be noted that the effect of the existence of an actual state of war upon British territory is to prevent the civil Courts from calling into question acts done by the military authorities, regardless of the question whether there is any enemy occupation or not: *Ex parte Marais* [1902] A.C. 109; *Halsbury* (Hailsham), vi, § 619.

⁴ *International Law* (8th ed.) (Pearce Higgins), p. 579.

the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion [that is, occupation]; and as between the state and individuals the evil would be scarcely less,—it would be hard for example that payment of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government.'

Similarly Oppenheim¹ in his chapter on *Postliminium* says:

'if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has again taken possession of the territory. However, this only extends to acts done by or under the authority of the occupant *during the occupation*.'

Thus we apprehend that if the enemy were to occupy the Scilly Isles (we refrain from instancing the Channel Islands because they have their own legal system), all the ordinary transactions of private law taking place in accordance with existing English law during the enemy administration, such as contracts, dispositions of movables and immovables, devolution of property by will or upon intestacy,² and all normal official transactions such as the collection of ordinary taxes, would, at the end of the occupation, be treated as valid, and all judgments, civil and criminal, given in accordance with English law or with such regulations as the enemy was lawfully entitled to prescribe, would be respected.³ But if the enemy were to introduce a new system of landholding, for instance, to divide up an estate amongst the tenants and purport to make them freeholders, or a new system of local govern-

¹ Vol. ii, § 282.

² Thus it was held by a Greek Court (the Court of Appeals in Thrace) in 1925 that a will made on Bulgarian territory under occupation by inter-Allied troops in February 1920 and in accordance with Bulgarian law was valid, for during occupation the law of the State owning the territory remains in force: *Annual Digest*, 1925-1926, Case No. 364. For a Polish decision on a will, see *ibid.* 1927-1928, Case No. 380.

³ In regard to convictions for offences, it seems necessary to exclude from this statement any unexpired result of convictions for offences against the security of the occupant and his troops and any political offences directed against him. But I can see no reason why a conviction for an offence against a rationing system or against a prohibition of profiteering imposed by the occupant in the interest of the community as a whole should not in principle continue to have effect after the end of the occupation: see above, p. 321. The Peace Treaty may, of course, expressly deal with this matter.

ment, or a new marriage law,¹ or were to disestablish and disendow the Church of England, such measures would not be respected.

In the dearth of native authority, it is permissible to refer to an American decision, *United States v. Rice*² (1819), in which it was held by a judge of great authority (Story J.) that import duties paid to the British Government while in military occupation of the American State of Maine in 1814-1815 could not be claimed again by the American Government after the occupation had ceased. This and other American decisions³ support the general principles which have been outlined above. Story J.'s description in *United States v. Rice* of the legal effects of occupation is of interest:

'By the conquest and military occupation of Castine [clearly, he does not mean by 'conquest' the transfer of sovereignty], the enemy acquired the firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other law could be obligatory upon them, for where there is no protection or allegiance of sovereignty, there can be no claim to obedience.'

¹ See, however, a decision of the Supreme Court of Hungary reported in *Annual Digest*, 1935-1937, Case No. 232, where a marriage took place between a Hungarian national and a woman (whose nationality does not appear) in Hungarian territory during its occupation by Czecho-Slovak troops during an armistice in November 1918 and before the Treaty of Trianon, by which the territory was ceded to the Czecho-Slovak State, came into force. The marriage ceremony was in accordance with the Czecho-Slovak law which the occupying Government had introduced, but not in accordance with Hungarian law. Nine years later the husband (who became a Czecho-Slovak national by the Treaty of Trianon) petitioned a Hungarian Court to annul the marriage on the ground that at the date of the marriage only the Hungarian law was in force at the place of the marriage; the Court held that the Czecho-Slovak Government had exceeded the rights of an occupying Power in changing the law of marriage by introducing an optional form of marriage before the cession of the territory was completed, but nevertheless upheld the marriage upon the basis of the principle *locus regit actum* and because it did not offend *ordre public* upon which ground alone it could be questioned.

² 4 Wheaton 246.

³ *U.S. v. Hayward* (1815) 2 Gallison 485; *Fleming v. Page* (1850) 9 How. 603; *Cross v. Harrison*, 16 How. 190; *New Orleans v. Steamship Co.*, 20 Wall. 387; *Dooley v. United States*, 182 U.S. 222. See generally Moore, *Digest of International Law*, § 21; Hyde, §§ 688-691; and the cases cited later in this chapter (pp. 343 *et seq.*) upon the powers of revolutionary Governments.

In the case of a belligerent occupation occurring in a war in which Great Britain is neutral, an English Court will seek and follow the guidance of the Foreign Office as to the fact of the occupation and possibly also as to its territorial extent. Thus in the course of the recent conquest of Ethiopia by Italy the Chancery Division was called upon in *Bank of Ethiopia v. National Bank of Egypt and Liguori*¹ to decide whether the Bank of Ethiopia, a company incorporated by Ethiopian law, had been dissolved or had otherwise ceased to exist by force of a decree promulgated by the Italian Government on May 9, 1936. The relevant facts as found by Clauson J. are as follows:

May 1 or 2. The Emperor of Ethiopia left his capital, Addis Ababa.

May 5. The Italian Army entered the capital.

May 9. The Italian Government issued a Proclamation purporting to annex Ethiopia. As from that date 'it appears as a fact' (said Clauson J.) 'from the evidence before me that the Italian Government, through its officers, exercised effective governmental control over Addis Ababa, the "siège social" of the bank, and over a gradually increasing tract of Ethiopian territory'.

June 20. 'A (*semble* Italian) government decree, valid according to the law as recognized and administered by the *de facto* government, placed the bank in liquidation....'

December 1936. At some later date the British Foreign Office issued a certificate to the effect that in December 1936 the United Kingdom Government 'recognized the Italian Government as being in fact (*de facto*) the government of the area of Abyssinia then under Italian control'—which area (said Clauson J.) 'seems to have covered the whole of the portion of Ethiopian territory in which any activities of the bank had ever been carried on'.

April 28, 1937. (The day before the trial) the Emperor of Ethiopia, while in England, signed a decree by which he purported to empower all companies incorporated under Ethiopian law to hold valid meetings and to carry on business outside Abyssinia.

The learned judge declined to accept the suggestion that any limitation could be placed upon the full sovereignty of the Italian Government at the material times, either on the ground that it was merely in belligerent occupation of Ethiopian territory and that therefore its decrees were governed by the limits which international law imposes upon the decrees of a belligerent occupant, or on the ground of the continued recognition by the United Kingdom Government of some measure of *de iure* sovereignty in the Emperor of Ethiopia. But he

¹ [1937] Ch. 513; and see *Zarine v. Owners of S.S. Ramava: McEvoy v. Owners of S.S. Otto* [1942] Irish Reports 148.

added that if the Italian decrees were limited to the necessity of preserving peace, order, and good government, he would nevertheless uphold the decree in question, having regard to the importance of the Bank of Ethiopia as the only bank of issue in the country acting in close contact with the Minister of Finance.¹ Note that the decree liquidated the bank and did not merely control it.

With great respect, it is submitted that Clauson J. in this judgment has invested a Government in belligerent occupation of the territory of another with a degree of power which it is difficult to reconcile with the rules of international law as accepted by this country, and moreover puts a premium upon aggression by the recognition which it gives to the decrees of a successful invader. Ought neutral Courts, during and after the recent war, to uphold decrees made by the German Government, while the war was still in progress, in territories occupied by them—Poland, Norway, Holland, Belgium, France and the Channel Islands—which exceed the limits imposed by international law upon the purposes of the decrees of a belligerent occupant, namely, the maintenance of order, the preservation of the rights of the inhabitants and the safety of his forces? As appears from the Foreign Office certificate referred to above, even in December 1936 the Italian Government did not control the whole of Ethiopia, and it is common knowledge that this state of affairs continued for some time later. The value of rules governing belligerent occupation and defining the powers of an occupant is sensibly diminished if within six weeks of his arrival in the enemy capital and before he has brought the whole country under his control he is to be invested with the full panoply of sovereignty—his acts having ‘the status of acts of a fully responsible government’ and ‘the recognized *de facto* government must for all purposes... be treated as a duly recognized foreign sovereign state’.²

From a political point of view this enlargement of the status of belligerent occupation is retrograde and much to be deplored. During the past century it was gradually made clear—and very much to the benefit of the inhabitants of territory invaded and occupied—that belligerent occupation is a provisional state of affairs and that it does not transfer sovereignty. That must await either subjugation or cession by treaty of peace. Now we are told that before the whole of an

¹ Undoubtedly a belligerent occupant would be entitled in the interests of the welfare of the inhabitants to control the operations of so important a bank, but we cannot see how its liquidation can be reconciled with international law: see also the Manila case cited in note 4 on p. 321 above.

² At p. 522. See Lauterpacht, *Recognition in International Law*, pp. 285–287, 348, 365, 432.

invaded country has been reduced and thirty months before His Majesty's Government has recognized the conquest *de iure* (which in the case of Ethiopia took place on November 16, 1938) the occupant can for all practical purposes be in possession of sovereignty. It is true that—as is shewn in *A. M. Luther Co. v. James Sagor & Co.*¹—recognition once granted relates back, but it can only relate back to the establishment of the status recognized. In the *National Bank of Egypt* case we suggest that the recognition of *de facto* governmental control certified by the Foreign Office can only relate back to the time at which that control began and did not compel the Court to say that on May 9, 1936, the date of the proclamation of annexation, Italy ceased to be in belligerent occupation of a large part of Ethiopia and became *de facto* sovereign over it; for, even if the war was for all practical purposes over in December 1936, it could not be said to be over on May 9. In short, the recognition relates back to the date at which belligerent occupation ceased and merged in *de facto* sovereignty, but it cannot obliterate or curtail the belligerent occupation.

The Italian proclamation of annexation, which was issued four days after the Italian army entered the capital, and while there were still large areas of the country which had not been reduced, was in no way conclusive upon an English Court. A valid annexation involves the transfer of sovereignty, and a purported annexation which precedes subjugation, that is, the virtual annihilation of the enemy forces, is premature and of no effect.²

The decisions in this case and in *The Cristina* (about to be discussed) are subjected to a searching analysis in the *British Year Book of International Law* for 1938 by an anonymous critic who is known to possess high authority. He says:³

'Clouston J. appears to have relied upon the fact that there was no other government in any part of Ethiopia than the *de facto* Italian Government to reject the argument that the Italian Government should only be regarded as in military occupation of enemy territory: but it is submitted that this is the wrong reason for the right conclusion. There was (except in a few square miles) no government in Belgium except the German Government from 1915 [*sic*] to 1918, but the German Government was during these years only in "military occupa-

¹ [1921] 3 K.B. 532.

² Upon the effect of the withdrawal by Great Britain in 1940 of her recognition of the Italian conquest and annexation of Ethiopia, see *Azazh Kebbede Tesema v. Italian Government*, Law Reports of Palestine, vii (1940), p. 597 and *Annual Digest*, 1938-1940, Case No. 36.

³ Pp. 236-249.

tion". The test is whether the war is over or not, and for the court whether the government have recognized that it is over.'

No one could deny that, so far as this country and its Courts are concerned, Germany was merely in belligerent occupation of Norway, Holland and Belgium, nor would proclamations of annexation make any difference, so long as the war continued.

We hope that we may be excused for commenting at some length and with some emphasis upon this decision, which we find difficult to reconcile with the rules of international law governing the normal steps in the process of the conquest of one country by another—invasion, belligerent occupation, conquest by cession or subjugation. Our excuse must be that the weight which attaches to the words of Lord Clauson is such that that portion of his judgment which minimizes the stage of belligerent occupation and invests the invader so rapidly with complete sovereignty may have deplorable political consequences.

Where Great Britain is a belligerent and questions arise as to the fact of British occupation of enemy territory or enemy occupation of British or allied territory, one would now expect to find English Courts following the practice of consulting some branch of the Executive as to the *fact*, including the extent, of the occupation, while reserving for themselves the question of the *effects* of the fact. The practice of consulting the Executive and accepting its reply in regard to matters within the international sphere has developed rapidly in recent years.¹ In the older cases the Courts were more inclined to take judicial notice of such matters or ascertain them by evidence.²

2. *Effects of Acts of an Occupying Revolutionary Government in a Civil War*

- (a) When the revolution occurs on the territory of a foreign State.
- (b) When it occurs on British territory.

(a) Here again we shall find that in regard to the preliminary question as to the *fact* of occupation which must precede adjudication upon its *effects*, the recognition of the situation by the British Government is a decisive factor for English Courts. Recognition of Belli-

¹ See *Annual Digest*, 1925-1926, p. 128.

² So far as can be ascertained from a perusal of the report of *R. v. L. J. de Jager* in 22 Natal Law Reports (1901), p. 65, and on appeal to the Privy Council [1907] A.C. 326, the Special Court constituted to try this type of case did not consult the Executive as to the extent of the enemy penetration into Natal, but acted upon evidence or its own knowledge.

gency granted by Great Britain, as was granted in the case of the American Civil War, places the revolutionary Government *vis-à-vis* English Courts in substantially the same position as the Government of a belligerent State engaged in a conflict in which Great Britain is neutral. We shall also find that, even when Recognition of Belligerency is not granted, the recognition by the British Government of certain facts and situations arising out of the hostilities can have important legal consequences.¹ Some of the decisions raise questions of the extra-territorial effect of foreign laws and decrees, and we have found it convenient to defer the treatment of that question to the next chapter.

The American Civil War cases. Although it was necessary for the Federal Government to bring several actions in English Courts for the purpose of liquidating the consequences of the Civil War, we are not aware of any reported action in which an English Court had to consider what effect should be given to the acts of the Confederate Government.

It is instructive in the lack of English authority to note how the American Courts after the Civil War dealt with the governmental acts of the rebel States. An American writer² referring to the 'numerous cases which turned upon the validity of decrees of the Confederate States', remarks:

'The Supreme Court of the United States sustained numerous acts relating to the creation of domestic corporations, the sale of property, and payment of debts in the specie of the regime. It generally upheld all laws which were necessary to the peace and good order of the realm, such as sanctioning and protecting marriage, determining laws of descent, regulating the transfer of property and providing legal redress for injuries... in each instance the acts, decrees or laws are recognized as valid by the Supreme Court unless public policy and justice required otherwise.'

Cases arising out of the Russian Revolution of 1917. The principle to be deduced from these cases is that English Courts must—directly or indirectly—seek and then follow the guidance of the appropriate branch of the Executive, namely, the Foreign Office, as to the status

¹ The literature upon Recognition of new Governments and States, whether arising from revolution or otherwise, is vast and the decisions are numerous. I have tried to avoid referring to them except in so far as they bear upon the strict subject-matter of this article. References will be found in Oppenheim, i, § 71-75 and notes, and bibliography preceding § 71 and in notes.

Upon the domestic aspect of rebellion on British territory, see numerous cases arising out of the recent 'troubles' in Ireland in *Irish Reports* from 1921 onwards.

² Hervey, *Legal Effects of Recognition* (1928), p. 145, citing a number of cases; and see p. 350 of this chapter.

of a revolutionary Government and the date of its effective establishment. For these purposes what is called Recognition *de facto*, or more correctly, recognition of a Government as being the *de facto* Government of the territory in question, has the same effect as recognition of the Government as being the Government *de iure*.

Thus in the case which is mercifully referred to as *A. M. Luther Co. v. James Sagor & Co.*,¹ once the United Kingdom Government—between the date of the hearing in the King's Bench Division and the date of the hearing of the appeal—had recognized the Soviet Government 'as the *de facto* Government of Russia', and this fact was certified by the Foreign Office, the Court of Appeal was unable to question the validity of the act of that Government in nationalizing *within its own territory* the plaintiffs' timber and selling it *in London* to the defendants, the timber being at the time of sale still abroad.² Moreover, the effects of the recognition dated back to the time at which the Soviet Government established its power, upon which point the Foreign Office also pronounced.

The question of the precise area over which a revolutionary Government exercises authority at a given moment was treated in *The Jupiter* (No. 3), another Russian case, as a question of fact to be determined by the Court itself upon evidence and not one to be settled by the certificate of the Foreign Office.³ In that case, where one of the many questions to be determined was whether two decrees issued by a certain Government in Russia affected a ship registered at Odessa and at the material dates lying at Odessa, Hill J. positively declined to ask the Foreign Office to make inquiries on the question what Government was in power at Odessa at the material dates. 'No,' he said, 'as regards a *de facto* Government it is a question of evidence, and the evidence is closed. I shall not consult the Foreign Office.'⁴ In this ruling he was

¹ [1921] 3 K.B. 532; approved by the House of Lords in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse and Others* [1925] A.C. 112, 124. See the volumes of the *Annual Digest* for a number of these Russian cases, British and foreign.

² An anonymous commentator in the *British Year Book of International Law*, 1930, p. 229, points out that the American decision of *Ricaud v. American Metal Co.*, 246 U.S. 304, applies this principle even to the case where the owner of the property nationalized in the foreign State is an American citizen.

³ [1927] P. 122, 250.

⁴ At p. 126. But, 'the question of what is within the realm of England [*sic*] being one of the matters of which the Court takes judicial notice', two out of three members of the Court of Appeal in *The Fagernes* [1927] P. 311, considered themselves to be conclusively bound by a statement as to its limits made by the Attorney-General.

The Gagara [1919] P. 95, in which Hill J. gave effect to the condemnation in prize by the Estonian Government of a captured ship flying the flag of the Soviet

expressly upheld by the Court of Appeal, but when we come to consider the Ethiopian and the Spanish Civil War cases we shall find the question of the local scope of authority treated differently.

The Spanish Civil War of 1936-1939. A dispute¹ having arisen as to the power of a group of persons claiming to be the directors of the Banco de Bilbao to determine the agency of the managers of that bank's London branch, it became necessary to decide what system of law prevailed at the material date in the place where the corporate home (*domicilio social*) of the bank was situate, namely Bilbao, for it was that system which governed the interpretation and the operation of the articles of the incorporated bank. 'The question', said Clauson L.J.² in delivering the judgment of the Court of Appeal, 'accordingly resolves itself into this: What is the Government whose laws govern in such a matter the Banco de Bilbao? The answer would seem necessarily to be: the laws of the Government of the territory in which Bilbao is situate.' If there is any doubt as to what Government that is, the Court must consult the Executive through the appropriate channel. The answer given, in a letter from the British Foreign Office to the solicitors of one of the parties, was that the Government set up by the insurgent General Franco in the Basque country comprising Bilbao since his capture of Bilbao on June 19, 1937, was recognized by His Majesty's Government as the Government which exercised *de facto* administrative control over that portion of the Basque country which comprised Bilbao. Hence it followed that an English Court could not allow the acts of that Government to be impugned as the acts of an usurping Government, 'and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the *de iure* Government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts'.³

In another case⁴ the Spanish Republican Government had requisitioned in 1937 a Spanish ship registered in Bilbao but then outside Spanish waters. In 1938 the Nationalist Government of Spain requisitioned her

Government, may also be said to arise out of the Russian Revolution, but the Esthonian Government was not regarded as a revolutionary Government. It was probably, for the brief period of its existence, a partial successor of the Imperial Russian Government.

¹ *Banco de Bilbao v. Sancha: Same v. Rey* [1938] 2 K.B. 176.

² At p. 195.

³ At p. 196. Following *A. M. Luther Co. v. James Sagor & Co.* (*supra*); *White, Child & Beney v. Eagle Star, etc., Insurance Co.* (1922) 127 L.T. 571; and *Bank of Ethiopia v. National Bank of Egypt* (*supra*). Note that this important statement of principle applies both to international and to civil war.

⁴ *Government of Republic of Spain v. S.S. Arantzazu Mendi* [1939] A.C. 256, 258:

and obtained possession of her by the consent of her owners and master. While she was lying in the Thames, the Republican Government issued a writ *in rem* to obtain possession. The 'Nationalist Government of Spain' moved to set aside the writ on the ground that it impleaded a foreign sovereign State, being in possession. It thereupon became necessary for the Court to consult the Foreign Office, which replied that 'His Majesty's Government recognizes the Nationalist Government as a Government which at present exercises *de facto* administrative control over the larger portion of Spain.... The Nationalist Government is not a Government subordinate to any other Government in Spain....' The letter added that the question whether in these circumstances the Nationalist Government is to be considered 'a foreign sovereign State' appeared to be a question of law for the Court, which answered the question in the affirmative and set aside the writ.

It thus appears from these two decisions that the English Courts accept the view that there can be two Governments recognized by His Majesty for one State, one *de facto* and the other *de iure*, coordinate but not territorially coincident, and with fluctuating frontiers. The recognition of a *de facto* Government which is in control of only part of a State's territory is believed to be an innovation. At any rate we cannot call to mind a former instance (unless it be the almost contemporaneous case of Ethiopia), and we venture to wonder whether this view is not the product of the highly anomalous political circumstances of the recent Spanish Civil War and therefore only to be followed in the future with the greatest circumspection.

(b) *When the revolution occurs in British territory.* Revolutions in British territory are rare, and the judicial authority is scanty.

Professor Holdsworth has described in his *History of English Law*¹ the general outline of the manner in which the legal events occurring during the Commonwealth were dealt with by the early Restoration Parliaments. 'The general principle', he says, 'upon which these Parliaments proceeded was that all the Acts of the Long Parliament which had received the royal assent were valid, and that all other legislation was invalid.' There were exceptions in both directions. 'On grounds of necessity provision was made for the continuance of judicial proceedings begun under the Commonwealth..., for the confirmation of certain judicial proceedings and completed acts in the law which had taken place,² and for the validity of marriages celebrated since 1642 under the authority of any Act or Ordinance.'

The American War of Independence gave rise to fewer reported decisions of English Courts than might have been expected.¹ In spite of some wavering the main principle is, we think, clear, namely, that an English Court will not recognize and give effect to the official acts, legislative or otherwise, of a Government in rebellion against His Majesty. Whether this reference would extend to ordinary routine acts such as the granting of probate of wills, or judgments in suits between parties concerning matters not connected with the rebellion, does not appear to have called for decision.

*Dudley v. Folliott*² was the case of an action of covenant upon a covenant contained in conveyance of lands in the province or State of New York made in April 1780, that is, during the American War of Independence. The plaintiff was evicted by commissioners appointed in pursuance of an Act passed by the State of New York confiscating the land at some date before the date of the conveyance, and the defendant was sued for breach of his warranty that he had full power and authority to grant and convey the premises to the plaintiff's vendor and for quiet enjoyment. On a demurrer the plaintiff made two points:

(i) That by reason of the confiscatory Act the defendant at the time of his covenant had not a good title to the premises which were then vested in the State of New York, and that the recognition of the independence of the United States by the subsequent treaty of peace had retrospective effect (and therefore presumably prevented an English Court from holding that the confiscatory Act was illegal and invalid).

(ii) That the covenant extended even to an eviction by a wrongdoer.

The Court 'having no doubt about the law as it respects the first question, and thinking it would lead to the discussion of improper topics, would not permit it to be argued'. As to the second question, the Court limited the covenant to lawful interruptions and found for the defendant, meaning thereby, we suggest, that they considered the eviction of the plaintiff by the rebel commissioners to be unlawful.

*Ogden v. Folliott*³ was argued three times—in the Common Pleas,

¹ It may be useful to the reader to mention some of these cases, though they are not strictly relevant to the matters discussed here: *Kempe v. Antill* (1785) 2 Brown's Chancery Cases 11; *Wright v. Nutt*, 1 H. Bl. 136; *Wright v. Simpson* (1802) 6 Ves. Jun. 714; *Peters v. Erving* (1789) 3 Brown's Chancery Cases 54; *Attorney-General v. City of London* (1790) *ibid.* 171 (affecting William and Mary College in Virginia); *Doe d. Thomas v. Acklam* (1824) 2 B. & C. 779; *Auchmuty v. Mulcaster* (1826) 5 B. & C. 771; *Stansbury v. Arkwright* (1833) 5 C. & P. 575; *Sutton v. Sutton* (1830) 1 Russ. & M. 663; *In re Bruce* (1832) 2 C. & J. 436.

² (1790) 3 T.R. 584.

³ (1789) 1 H. Bl. 123; (1790) 3 T.R. 726; (1792) 4 Bro. Parl. Cas. 111.

the King's Bench on writ of error, and the House of Lords. Although for a century and a half it has been regarded as a leading authority for the rule that an English Court will not enforce a penal law of a foreign State, it also rests on a preliminary proposition which takes precedence of the rule as to penal laws and which, strictly speaking, rendered unnecessary and irrelevant the application of that rule.¹ *A* and *B* were British subjects in the territory later known as that of the United States of America, when in 1769 *B* made a bond in favour of *A* to secure a loan. In 1776 the revolution broke out. In 1779 both were attainted by the laws of their respective revolutionary States, their property was confiscated, and they fled to England. In 1783 by a treaty of peace Great Britain acknowledged the independence of her revolted colonies. Thereafter *A* brought suit on his bond against *B*.

(a) In the Court of Common Pleas Lord Loughborough gave judgment in favour of *B* on the ground that 'the penal laws of foreign countries are strictly local' and seemed to be disposed to admit the validity of the confiscatory Act of the State of New York in other respects. In the words of Lord Kenyon Ch.J., in the King's Bench: 'The Court of Common Pleas...stopped at the plea', considering it to be enough.

(b) The Court of King's Bench affirmed the judgment, but Lord Kenyon, with the concurrence of Ashhurst J., did so on a different ground, namely, that the confiscatory Act was illegal, having been passed by persons in rebellion against His Majesty, that *A* and *B* came to England with their mutual rights and duties intact, and that whatever retrospective validity the confiscatory Act might acquire their situation as individuals was not affected by it. These two judges at any rate appreciated the distinction between the penal rule and the wider one. Buller J. relied on the rule as to penal laws. So did Grose J., but he also described the confiscatory Act as 'an Act, which at the time it passed was considered as mere waste paper or, if it were of any avail, was an Act of Treason'.

(c) The speeches delivered in the House of Lords (which affirmed the judgment) are not reported, but it is relevant to mention that the first of the arguments advanced on behalf of the successful defendant in error was that 'no assumed Act of legislation by the colonies of North America, while in a state of rebellion against His Majesty, can legally affect the rights of any subject of this realm'.

It is unfortunate that the legislation which gave rise to this litigation was of a penal nature. That fact confused the issue.

¹ See note (a) by editor of Dicey, p. 536.

In *Barclay v. Russell* (the Maryland case)¹ Lord Loughborough L.C., after the treaty of peace, had to consider the effect of the successful rebellion upon certain Bank stock in England bought by the Government of Maryland (which was 'a corporation under the Great Seal') before the outbreak of the War of Independence and held in the name of trustees. Before the treaty of peace the new State of Maryland passed a statute purporting to discharge the trustees, to appoint new trustees and to direct a transfer of the Bank stock. After peace had been concluded, Lord Loughborough declined to give effect to this statute in favour of the new State of Maryland or its assignees, and held that the fund, no object of the trust existing, must be at the disposal of the Crown to be dealt with under the treaty and not as a subject of municipal jurisdiction. But the value of the decision lies in the explanation of it which Lord Eldon gave in *Dolder v. Lord Huntingfield*² as follows:

'The Maryland case... does not touch such a case as this; a foreign independent State. That State was only a corporation under the Great Seal, dissolved by means, which a Court of Justice was obliged to consider rebellious; and then the transfer of the title from the State of Maryland to any other State was a question, a Court of Justice could look at, as a question of law, only in one way; and the principle was, that the Court could not admit, that the title passed to the independent States of America by an act which we were obliged to call "rebellion". What national justice was to do, after national policy had arranged the relative situation of the countries, was to be decided, and was decided, elsewhere.'

The principle deduced appears to be that an English Court, unless directed to do so by the Legislature, cannot give effect to the acts of a Government which has taken its rise in a rebellion against His Majesty and is still in a condition of rebellion at the date of the act in question.

American Courts have had more frequent occasion than our own to deal with the legal effects of the acts of revolutionary Governments. This must be our excuse for reproducing the following summary, taken from two decisions of the Supreme Court of the United States³ and reproduced in Moore, *Digest of International Law*,⁴ which may be said to sum up the fruits of American judicial experience arising out of the American Civil War:

'(1) *Ford v. Surget*. From the numerous decisions of the Supreme Court, beginning with the *Prize Cases*, 2 Black. 635, and ending with

¹ (1797) 3 Ves. Jun. 424.

² (1805) 11 Ves. Jun. 283, 294.

³ *Ford v. Surget* (1878) 97 U.S. 594, 604, and *Baldy v. Hunter* (1898) 171 U.S. 388, 400.

⁴ § 22.

Williams v. Bruffy, 96 U.S. 176, and *Dewing v. Perdicaries*, *id.* 193, the following propositions are plainly to be deduced:

1. The district of country declared by the constituted authorities, during the late civil war, to be in insurrection against the Government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions.

2. There was no legislation of the Confederate congress which this Court can recognize as having any validity against the United States, or against any of its citizens who, pending the war, resided outside of the declared limits of the insurrection.

3. The Confederate government is to be regarded by the Courts as simply the military representative of the insurrection against the authority of the United States.

4. To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other; that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, "on the footing of those engaged in lawful war" and exempting "them from liability for acts of legitimate warfare".

(In *Ford v. Surget* (1878) 97 U.S. 594 it was held that a statute of the Confederate Congress could have, as an act of legislation, no force whatever in any Court recognizing the Federal Constitution as the supreme law of the land.)

(2) *Baldy v. Hunter*. From these cases¹ it may be deduced

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

"That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;

'That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame "except when proved to have been entered into *with actual intent* to further invasion or insurrection"; and,

'That judicial and legislative acts in the respective States composing the so-called Confederate States should be respected by the Courts if they were not "hostile *in their purpose* or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution"....'

The following passage comes from the judgment of the American Supreme Court in *Texas v. White*,¹ also arising out of the Civil War and referring to the acts of the Governments of the rebel Confederate States:

'It is not necessary to attempt any exact definition, within which the acts of such a State Government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injustice to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.'²

¹ (1868) 7 Wall. 700, 733; cited by Fischer Williams in *Transactions of Grotius Society*, xv, p. 74, note.

² Before leaving revolutionary Governments, it is worth while mentioning decisions bearing upon the fate of their property after their collapse: *United States*

De facto governmental control. We have mentioned earlier a transitional stage of *de facto* governmental control interposed (a) in international war, between the stages of belligerent occupation and complete *de iure* conquest either by subjugation or by treaty of cession, and (b) in civil war, between the outbreak and the final issue. It would be out of place here to attempt a full examination of the distinction between recognition of *de iure* and recognition of *de facto* situations and Governments, and we must be content to refer the reader to the numerous decisions and the large amount of literature available on this topic.¹ The distinction is mainly, if not entirely, political, and it is not easy to find any distinction between them so far as municipal consequences, that is, the legal effects as applied by English Courts, are concerned. There may be political reasons inducing the British Government for a time to be content with recognition of a *de facto* situation and for not proceeding too rapidly to recognize the same situation *de iure*; for instance, in the case of the Russian Revolution of 1917, the domestic factor of British political feelings and the disapproval which the methods of the Soviet Government incurred in the minds of very large and powerful groups in this country combined to prevent more than recognition of a *de facto* Soviet Government in 1921, converted into recognition of a *de iure* Government in 1924. In the case of the conquest of Ethiopia it is probable that our disapproval of the Italian aggression and our membership of the League of Nations were responsible for delaying recognition of the conquest *de iure* until November 16, 1938.

In the case of the Spanish Civil War the cause of the delay—we use the word in a morally neutral sense—was probably the Non-Intervention Agreement. Sometimes the reason may be purely prudence and caution lest the *de facto* state of affairs may be provisional and

of America v. McRae (1869) L.R. 8 Eq. 69; *The Same v. Prioleau* (1865) 33 L.J. Ch. 7, 2 H. & M. 559. Note the distinction between the right of the successful parent Government by virtue of succession and by virtue of its paramount title respectively. For two cases arising out of the civil war in Ireland which came to an end in December, 1921, see *Fogarty v. O'Donoghue* [1926] I. R. 531, and *Irish Free State v. Guaranty Safe Deposit Co.* (1927) 222 New York Supp. 182, *Annual Digest*, 1925-1926, Cases Nos. 76, 77.

¹ Oppenheim, I, § 75 f, notes. Recognition *de iure* and recognition *de facto* seem to me to be elliptical expressions, and in truth mean recognition of a Government or a situation as complying *de iure* or *de facto* with the conditions which international law requires before a Government is clothed with the normal rights and duties of a Government or before a situation can produce its normal international consequences. It is not the recognition which is *de iure* or *de facto* but the Government or situation. On that understanding we may use the convenient expressions recognition *de iure* and recognition *de facto*. See Lauterpacht, *Recognition*

ultimately reversed, as in the case of the recognition *de facto* of the Estonian National Council in 1919.¹

But in all these cases² it seems that the municipal consequences which were judged to flow from the recognition of the *de facto* situation were the same as if the recognition had been of the corresponding *de iure* situation. So far as the consequences of revolutions and civil wars are concerned, there is nothing new in this distinction. So far as conquests by international war are concerned, we are not aware that an English Court has been called upon to estimate the effect of the distinction until the recent case of *Bank of Ethiopia v. National Bank of Egypt and Liguori*,³ but we do not suggest that the application of the distinction to this sphere is wrong. What is important is that it should not be allowed to obscure the stage of belligerent occupation and to attach to that status the rights and duties appertaining to conquest recognized as a *de facto* situation. Belligerent occupation creates a well established status which has been equipped by International Law with rights and duties in the interests of order and the welfare of the inhabitants of the occupied territory.

¹ *The Gagara* [1919] P. 95.

² As in earlier cases such as *Republic of Peru v. Dreyfus Brothers & Co.* (1888) 35 Ch. D. 348.

³ See above, p. 340.

NOTE ON THE PRESENT STATUS OF GERMANY

It is evident that in the Allied occupation of Germany which began after the capitulation in June 1945, we are witnessing something which juridically differs from, and goes beyond, Belligerent Occupation. In the light of the collapse of government in Germany any attempt by the Allied Powers to confine themselves to the rights and duties of a belligerent occupant *stricto sensu* would have produced or continued a state of chaos: see *Rex v. Bottrill, ex parte Kuechenmeister* [1947] 1 K.B. 41, Foreign Office certificate of April 2, 1946, as to the status of Germany; Declaration by the four leading Allied Governments upon the Unconditional Surrender of Germany of June 5, 1945, whereby they assumed 'supreme authority with respect to Germany' (Cmd. 6648), and note on p. 402 below as to German property in Switzerland. The English Courts may some day have to consider the legal basis of laws made by the Allied Control Commission regulating matters outside the normal sphere of the activities of an occupant: see an expression in the Nuremberg Tribunals judgment of September 30 and October 1, 1946 (Cmd. 6964) p. 38: 'The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world.' See also the Official Gazette of the Control Council for Germany, particularly No. 1 and Supplement No. 1, Kelsen in *American Journal of International Law*, vol. 39 (1945), pp. 518-526 and Fried, *ibid.* vol. 40, pp. 326.

CHAPTER 18

EFFECTS OF BELLIGERENT OCCUPATION OF TERRITORY

PART II

G. EFFECTS OF ACTS OF WHOLLY OR PARTLY DISPOSSESSED GOVERNMENTS

This topic is almost *res integra* in England,¹ and up to date the decisions are very few. A number of foreign Allied Governments have been accorded the hospitality of a war-time home in London and are exercising there in varying degree the functions of government. This novel state of affairs has raised some problems involving fundamental principles. We shall deal with them under the following headings:

1. General principles relating to the exercise of governmental functions in England by a foreign Government.
2. General principles relating to the extraterritorial effect of foreign laws and decrees.
3. Decisions during the War of 1939 to 1945.
4. Constitutionality of the legislation or other official acts of a foreign Government.
5. The position of ships.
6. Changes made in the law by the dispossessed Government during the occupation.

I. *General Principles Relating to the Exercise of Governmental Functions in England by a Foreign Government*

We shall begin by attempting to state what appear to be the underlying principles.

(i) It would be a violation of British sovereignty for a foreign Government to exercise its sovereignty upon British soil without His

¹ For some foreign decisions, see the volumes of the *Annual Digest* from 1919 to 1940 under such titles as Jurisdiction, Territorial and Personal, and Extra-territorial Effect of Foreign Legislation, Immunities of Foreign States, and in particular the volume for 1938-1940, Cases Nos. 53-57. Many of the topics dealt with in this chapter are discussed in the *Czecho-Slovak Year Book of International Law* (London, March 1942). See *Journal of Comparative Legislation* (3rd ser.), vol. 24 (1942) for articles on Polish, Czechoslovakian and Norwegian

Majesty's consent. By exercising its sovereignty is meant the doing of any of the acts normally associated with the carrying on of the business of government, such as the administration of justice,¹ the arrest even of its own nationals,² their punishment, the seizure of their property, the recruiting or maintenance of armed forces and, possibly, legislation or the making of executive decrees.

(ii) Consent, express or implied, is frequently given by one Government to the exercise of acts of sovereignty by another upon the territory of the former;³ for instance, the commanding officers of foreign public ships are habitually allowed by the local sovereign to exercise jurisdiction over members of their crews in accordance with the law of their own country,⁴ and a similar jurisdiction is allowed over the members of foreign armed forces, at any rate in respect of offences committed while on duty or within their own lines.⁵ In both cases the exercise of this jurisdiction is implied from the permission given by the local sovereign for the entry of the foreign public ships or armed forces.

(iii) The conduct of foreign relations (particularly in time of war and therefore in dealing with allies, for the Crown has a wide prerogative as a belligerent) lies within the prerogative of the Crown, and it may be that there are certain exercises of sovereignty by foreign Governments upon British soil which the Crown could authorize without the sanction of a statute. It is, however, probable that the establishment by a foreign Government of Courts of law on British territory is not legally possible without statutory sanction.⁶ At any rate, the jurisdiction of such foreign Courts could not become effective without the aid of a statute, for only in this way would it be possible for their judgments to be enforced by civil execution or by arrest and imprisonment. Otherwise a person affected might invoke the aid of an English Court by means of a writ of *habeas corpus* or of actions of false imprisonment and trespass, and the common law would afford no adequate answer to him.⁷

¹ The *Duc de Sully's* case (1603), Satow, *Diplomatic Practice* (2nd ed.), § 359.

² *Sun Yat-Sen's* case (1896), *ibid.* § 383; *Vaccaro v. Collier* (American) 51 F. (2nd) 17, *Annual Digest*, 1929-1930, Case No. 180; *Villareal v. Hammond* (American) (1934) 74 F. (2nd) 503, and *In re Jolis* (French), *Annual Digest*, 1933-1934, Cases Nos. 77 and 143; Oppenheim, i, §§ 125-128, and particularly note 2 to § 128.

³ See last case cited in note 3 on p. 379 below.

⁴ Oppenheim, i, § 450; *Chung Chi Cheung v. The King* [1939] A.C. 160.

⁵ Oppenheim, i, § 445. See *Rex v. Navratil*, Warwick Winter Assizes, 1942, and a group of cases arising in Egypt from the presence of foreign troops during the recent war, all to be reported in the forthcoming supplementary volume of the *Annual Digest*, 1919-1942.

⁶ See Chitty, *Law of the Prerogatives of the Crown*, p. 76.

⁷ See the Allied Forces Act, 1940, and the Allied Powers (Maritime Courts) Act, 1941; Viscount Simon and Dr J. M. de Moor in 58 L.Q.R. (1942), pp. 41

(iv) The mere fact that a foreign Government has been deprived of the control of a part or the whole of its territory by an enemy in no way invalidates legislation passed, or other acts of sovereignty done, by it outside its normal territory, provided that its constitutional law contains no insuperable obstacle to the validity of such legislation or other sovereign acts,¹ and provided that His Majesty continues to recognize it as the *de iure* Government and recognizes no other Government as the *de facto* sovereign. There is a clear legal distinction between the *de facto* Government of a country and a belligerent occupant, and it is inconceivable that any of His Majesty's Governments would recognize the enemy occupant of British or allied territory as the *de facto* Government of that territory. Even a neutral Government would, we submit, be bound to draw this distinction during the war and could only recognize acts done within the lawful scope of the authority of a belligerent occupant. Moreover,² the political sympathies of a technically neutral State may be such that it will readily continue its recognition of an exiled Government and give extraterritorial effect to its decrees.

(v) Most of the official acts of the dispossessed allied Governments, such as the making of decrees, were done on British territory where they had found refuge, though some decrees may have been made in some corner of allied territory still remaining in the control of its proper Government before that Government went into exile. Unless the laws of the allied country limit the validity of governmental acts to those done upon the territory of that country or a particular portion of it, it is submitted that it is immaterial in an English Court where the official act is done—be it in the home territory, or be it on British territory whereon His Majesty has consented to the establishment of the allied Government and the exercise of its governmental functions. There is no principle of international law which says that a Government cannot act validly upon foreign territory with the consent of the local sovereign.³ Moreover, when a Head of a State is visiting a foreign

et seq.; Schwelb in *Czecho-Slovak Year Book of International Law*, 1942, pp. 147-171; Kuratowski in *Transactions of Grothus Society*, vol. xxviii (1943), pp. 1-25; Schwelb in *American Journal of International Law*, xxxix (1945), pp. 330-332 (as to Soviet Forces) and King, *ibid.* xl (1946), pp. 257-279. Other statutes arising out of the mutual relations of the United Nations are the Allied Powers (War Service) Act, 1942, the National Service (Foreign Countries) Act, 1942, and the United States of America (Visiting Forces) Act, 1942; upon the last named, see Schwelb in *American Journal of International Law*, xxxviii (1944), pp. 50-73. Upon the deportation of Greek seamen from the U.S.A. to Great Britain, see *Moraitis v. Delany* in *Annual Digest*, 1941-1942, Case No. 96.

¹ See below, p. 374.

² P. 369.

³ In the case of *Re Savini*, *Annual Digest*, 1927-1928, Case No. 106, the Court of Appeal in Rome had to consider the effect of the acts of the Montenegrin

country, either for the purpose of a holiday or in order to take a cure for gout, it is the regular practice for official decrees and other documents requiring his signature to be sent to him for that purpose. We suggest therefore that the validity of the decree of an allied Government made in London is no greater and no less than if it were made in its own capital, subject to any requirement of its own Constitution as to the locality of governmental acts.¹

Further, if the allied Government has not been completely ousted from its territory and has non-metropolitan territory of which it is in control and to which it could resort, we do not see why the fact that that Government finds it more convenient to carry on the functions of government from London instead of, say, Curaçao or the Belgian Congo, should alter the legal quality of its acts. Particularly is this true when, as in the case of the Netherlands Government, the Constitution recognizes no distinction between metropolitan and colonial territory and expressly provides that 'the Kingdom of the Netherlands comprises the territory of Holland, the Dutch Indies, Surinam, and Curaçao'.

(vi) It may happen that owing to the suddenness of invasion and the exigencies of the ensuing crisis an exiled Government has come into power not strictly in accordance with the terms of the Constitution. Nevertheless, if His Majesty's Government recognizes that Government, a British subject can safely deal with it.²

2. *General Principles Relating to the Extraterritorial Effect of Foreign Laws and Decrees*

A. *As regards Property*.³

Two distinctions running through the cases must be noted at the outset.

Government when dispossessed and enjoying the hospitality of Italian soil during the occupation of Montenegro by Jugoslavian troops, and held that in order that that Government might exercise, within Italy and without interference by Italian courts, the rights of sovereignty derived from extraterritoriality, it must enjoy full and formal recognition by the Italian Government which was lacking. Baty, *Great Britain and Sea Law*, remarks (p. 83) that 'an act of sovereignty which has no operation except in the realm of ideas [i.e. does not consist of a physical act] may just as well be performed on one part of the earth's surface as another', and states that Mr Asquith became Prime Minister while in the South of France.

¹ See below, p. 374.

² *Republic of Peru v. Dreyfus Bros.* (1888) 38 Ch. D. 348, an instance of *de facto* recognition; *Guaranty Trust Co. of New York v. United States*, A.J.I.L. xxxii (1938), p. 848, *Annual Digest*, 1938-1940, Case No. 69; and an Award of Chief Justice Taft which goes even further, see *Arbitration between Costa Rica and Great Britain*, A.J.I.L. xviii (1924), pp. 147-174 and B.Y. 1925, pp. 199-204.

³ As regards ships, see later, pp. 377-382. On the *situs* of shares, see above, p. 225.

(i) The first is based upon the *locus* of the debt or other property at the time of the bringing of the action; namely, the difference between the operation of the law of a foreign country upon property in that country and its operation upon property in this country.

(ii) The second depends upon the meaning in which the somewhat ambiguous term 'enforcement' is used; namely, the difference between enabling a party in whom a foreign law purports to vest property to recover as *actor* that property in this country and recognizing and protecting that party's right to the property when another party sues him to recover it in this country.

It is believed that these two distinctions are implicit in the cases which we are about to discuss, though they may not always be recognized as expressly as one could wish.

Dicey's Rule 54 does not expressly raise these distinctions but the words 'either directly or indirectly' probably refer to them. The Rule states that

'The Court [i.e. an English Court] has no jurisdiction to entertain an action

(a) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State; or

(b) where the grounds of the action involve an act of State.'

(In order to confine our argument within reasonable limits we may ignore paragraph (b).)

It would appear that an English Court may find itself being invited to do any of the following things:

(a) To recognize and protect in England rights duly acquired in a foreign country under a law or a decree (legislative or executive) in respect of property situate in that foreign country at any relevant time (by which expression is meant the date of the coming into force of the law or the decree or some later date while it is still effective),

(x) when the foreign law or decree is free from objection from the English point of view, and

(y) when it is penal or otherwise objectionable from the English point of view:

(b) Actively to enforce upon property in England rights claimed under a foreign law or decree purporting to have extraterritorial effect, the property not having been situate in the foreign country at any relevant time,

(x) when it is not penal or otherwise objectionable from the English point of view, and

(y) when it is penal or otherwise so objectionable:

(c) When the circumstances are the same as in (b) except that the foreign law or decree does not purport to have extraterritorial effect;¹ here *cadit quaestio*.

(a) Let us begin with two cases in which English Courts were asked to recognize and protect in England rights already acquired in Russia under Russian laws or decrees which had already operated upon property situate in Russia at the time of the laws or decrees.²

In *A. M. Luther Co. v. James Sagor & Co.*³ a decree of the Russian Soviet Government had already divested from the plaintiffs and vested in that Government the property in certain plywood situate within the jurisdiction of that Government at the time of the decree. By a contract made in London that Government sold the plywood⁴ to the defendants, an English firm, who imported it into England. The English Courts recognized and protected the defendants' title by rejecting the plaintiffs' claim for a declaration that the plywood continued to be their property, for an injunction against dealing with it and for damages for conversion. When the Russian Soviet Government had received *de facto* recognition from His Majesty, the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.) declined to question the validity or morality of its acts, whereby property situate within its jurisdiction was vested in that Government. Attention should be drawn to the comments upon this decision made by Bennett J. in *Haile Selassie v. Cable and Wireless Limited* (No. 2),⁵ where he drew a distinction between 'acts in relation to persons or property' in the foreign country and acts in relation to property, a debt, situate in this country. He said:⁶

'I think the only point established by the decision [in *A. M. Luther Co. v. James Sagor & Co.*] is that when the Government of this country has recognized that some foreign Government is *de facto* governing some foreign country, the law of England will regard the acts of the *de facto* government in that territory as valid and treat them with all the respect due to the acts of a duly recognized foreign sovereign state. It is clear

Observations upon the *prima facie* territorial scope of English legislation and of the jurisdiction of English Courts will be found in *In re Sawers, ex parte Blain* (1879) 12 Ch. D. 522 and *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670.

² See Fachiri, 'Recognition of Foreign Laws by Municipal Courts', in *British Year Book*, 1931, pp. 95-106, and Mann in 59 *L.Q.R.* (1943), pp. 42-57 and 155-171.

³ [1921] 3 K.B. 532.

⁴ Being still in Russia: [1921] 3 K.B. at p. 545.

⁵ [1939] Ch. 182.

⁶ At p. 189; see also at p. 192.

I think that the acts so treated are acts in relation to persons or property in the territory which the authority so recognized is governing in fact.'

The learned judge was dealing with the acts of a foreign Government which had received only *de facto* recognition, but he likened it to a duly recognized foreign sovereign State, and we submit that in his opinion the principle is the same, namely, that in point of territorial scope the treatment to be accorded to the acts of a foreign Government depends upon the area which it controls.

In *Princess Paley Olga v. Weisz*,¹ the point involved was the same as in *A. M. Luther Co. v. James Sagar & Co.*, and the decision was to the same effect. Scrutton L.J. said:² 'our Courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.' It appears from the judgment of Scrutton L.J.³ that the sale to the defendant by the Russian Soviet Government took place in Russia.

Be it noted that in these two Russian cases the English Courts were recognizing and protecting rights acquired under foreign laws which had already operated upon property situate within the foreign jurisdiction at a relevant date; they were not enforcing foreign laws upon property situated in England but a title already vested by virtue of the operation of those laws within their own territorial limits. In such a case, namely, one of recognition and protection of rights duly acquired in a foreign country, it is believed that the character of the foreign law or decree under which the right was acquired is immaterial; it may be penal (which is not necessarily obnoxious to English ideas), it may involve confiscation without compensation or be otherwise objectionable from the English legal point of view. These two Russian cases appear to settle that; in both the issue of the immorality of the Russian confiscatory decrees was discussed and all the members of the two Courts of Appeal were of opinion that an English Court could not—*semble*, when asked to recognize and protect rights acquired under the laws of a foreign State, the Government of which has been recognized by His Majesty, in regard to property within the jurisdiction of those laws at a relevant date—question the legality of that Government's acts. Warrington L.J.'s distinction⁴ between 'enforcing' a contract made in a foreign country and 'resisting an endeavour . . . to induce the Court to ignore and override the legislative and executive acts of the Government of Russia and its agents affecting the title to property in that

¹ [1929] 1 K.B. 718.

³ At p. 722.

² At p. 725.

⁴ [1921] 3 K.B. at p. 549.

country' should be noted. In the words of an American judge cited by Cheshire¹ the validity of foreign penal or disqualifying laws 'will be admitted, and they will be enforced by the tribunals of other countries, as to acts which are done and rights which are acquired within the territorial limits of the community where these laws are established'. It is unfortunate in such cases to speak of *enforcing* foreign laws; what our Courts are doing is to recognize and protect rights duly acquired in a foreign country under the laws of that country.

It is further suggested that the statement of Russell L.J.² to the effect that 'This Court will not inquire into the legality of acts done by a foreign Government against its own subjects in respect of property situate in its own territory' must be understood as applying to cases in which the circumstances were similar to those in these two Russian cases, namely, cases of recognition and protection of rights duly acquired in relation to property situate within the jurisdiction of the foreign Government at a material time and not cases where the English Court is asked directly to enforce a foreign law. Even if the victim of the oppressive act were a British subject, it is submitted that his remedy would be diplomatic, and not judicial.

(b) Now let us consider the case where an English Court is asked actively to enforce the operation of a foreign law upon property now in this country when that property was not within the foreign jurisdiction at any relevant time.

If the foreign law or decree is penal, the answer is clear. Our Courts will not enforce it. If the foreign law or decree is not penal or otherwise obnoxious from the English point of view, the answer is not so clear. The relevant decisions contain much that bears upon both these questions and some of them deal with foreign laws and decrees not purporting to have extraterritorial effect.

Dicey states the following general principle:³

'A State's authority, in the eyes of other States and the Courts that represent them, is, speaking very generally, coincident with, and

¹ *Private International Law* (2nd ed.), p. 151, citing *Ware J. in Polydore v. Prince* (1837) *Ware* 402.

² [1929] 1 K.B. at p. 736.

³ At p. 20. Dicey uses the expression 'speaking very generally', and an obvious exception is the effect of a foreign bankruptcy in vesting in a trustee the bankrupt's movable property in England if the foreign bankruptcy law provides for extra-territorial effect. See also *British Year Book of International Law*, 1928, p. 168, where an anonymous writer states the principle as follows: "A country has no jurisdiction over property situated in another country." As a principle of English Private International Law it may be put thus: (1) The English Courts will not recognize that the legislation of a foreign country, or anything done under such legislation,

limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory.'

Beale, the leading American authority, states the principle as follows:¹

'§ 59. 2. The Extent of Law. The law of a State prevails throughout its boundaries and, generally speaking, not outside them. This is true of all territorial as distinguished from tribal or personal law; and the common law has been, generally speaking, a territorial law from its origin in the extension of the King's law throughout the realm to its present application in most English-speaking countries....'

'§ 63. 1. While a State can exercise no legislative jurisdiction in the strict sense outside its own boundaries, it nevertheless has power to command its own citizens wherever they may be. As regards them it may issue commands for the regulation of their conduct while they are abroad. "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens".'

He then says that 'the jurisdiction is in fact exercised only in the passing of criminal laws forbidding the doing of acts,³ and is not used, whether it could be so used or not, for the purpose of creating rights arising out of acts abroad....'

A number of expressions of American opinion upon the 'Territorial Operation of Laws' will be found in Moore's *Digest of International Law*, §§ 197-199.

How far can English judicial authority be found for these principles? The main difficulty lies in the dearth of cases in which the foreign legislation is free from all taint of penalty.

In *Reg. v. Lesley*,⁴ where the master of a British merchant ship contracted with the Chilean Government to transport from Chile to Liverpool certain political prisoners banished from Chile, the Court for Crown Cases Reserved held that he was rightly convicted of assault and false imprisonment in respect of his detention of them out-

can affect property not situated in that country. (2) The English Courts will not exercise jurisdiction in respect of property situated in a foreign country, nor apply English law to such property. There are exceptions to this principle, no doubt, but this is not the place to discuss them.'

¹ *Conflict of Laws*, i, pp. 308 and 314.

² Story J. in *The Apollon* (1824) 9 Wheat. 362, 370; *Prize Cases Decided in the U.S. Supreme Court*, pp. 1275, 1279.

³ *Reg. v. Anderson* (1868) 11 Cox C.C. 198.

⁴ (1860) 29 L.J. M.C. 97, and see *R. v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry* [1917] 1 K.B. 922, where, however, the point involved was different.

side Chilean waters, because 'for an English ship the laws of Chili, out of the state, are powerless, and the lawfulness of the acts must be tried by English law'.

In *Lecouturier v. Rey* (the Grande Chartreuse case),¹ the question of the effect in England of certain French legislation and of the appointment of a liquidator by a French Court, though hardly mentioned in the Court of Appeal, received a considerable amount of attention in the House of Lords. The main point was whether the French liquidator could prevent the Carthusian monks, expelled from France in 1901 and thereafter manufacturing their famous liqueurs in Spain, from exercising rights under trade marks registered in England and from enjoying the exclusive use of the word 'Chartreuse' in connexion with their liqueurs. In affirming the judgment of the Court of Appeal in favour of the monks, Lord Macnaghten said:²

'To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here.... But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations [under which the Carthusian Order was dissolved] is a penal law³—a law of police and order—and is not considered to have any extra-territorial effect.'

We suggest that in this passage Lord Macnaghten is, firstly, expressing adherence to the general principle cited above from the works of Dicey and Beale, and then pointing out that for two reasons the statement of that principle is *obiter* in this case, (a) because the foreign law is penal and (b) because it does not purport to operate outside French territory.⁴

In *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd*,⁵ Sargant L.J., speaking of Russian nationalizing decrees, said: 'Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here....'

In *In re Russian Bank for Foreign Trade*,⁶ Maugham J. said: 'If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to

¹ [1910] A.C. 262.

² At p. 265.

³ See also Lord Shaw at p. 271.

⁴ See also Lord Shaw at p. 267.

⁵ [1926] 1 K.B. 1, 15; the House of Lords [1927] A.C. 95 did not dissent from this view. See also *Manufacturing Co. I.A. Wormin Luetchg & Another v. Frederick Huth & Co.* [K.B.D. 2nd May 1928], not reported except in *British Year Book of International Law*, 1930, p. 235.

⁶ [1933] 1 Ch. 745, 767.

a person who was a Russian subject at the date of the nationalization decrees.' But this view was probably *obiter* as it appears that the Soviet Government did not attribute extraterritorial effect to the decrees.

In *The Jupiter* (No. 3)¹ Hill J., after stating that it was not suggested that ships differed from other chattels in this respect, said:

'If the *Jupiter* was not within the territory of the R.S.F.S.R. [at any material date], I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all cases: see, for instance, per Atkin L.J. in *Goukassow's* case;² per Sargant L.J. in *Sedgwick Collins & Co.'s* case in the Court of Appeal;³ and per the Lord Chancellor in the latter case in the House of Lords.'⁴

But, as Hill J. found that the Soviet decrees did not purport to have extraterritorial operation and that the *Jupiter* was not within Soviet jurisdiction at the relevant time, his opinion was doubly *obiter*.

Nor does *The Cristina*⁵ help us directly, for the question at issue was not whether a Spanish requisitioning decree could operate upon a Spanish ship which was not in Spanish territorial waters at the time of the decree, and had not since been in those waters, but whether the result of the action of the Spanish Consul at Cardiff in purporting to requisition the ship under that decree, in dismissing the captain and in appointing a new one, was to vest in his Government *de facto* possession or some other right or interest 'which was immune from interference by the Courts of this country'. It was argued that the Spanish decree could have no extraterritorial effect but it was not necessary to decide the point.

In *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*⁶ the plaintiffs

¹ [1927] P. 122, 144: The Court of Appeal (*ibid.* 250) did not dissent and had no occasion to do so.

² [1923] 2 K.B. 682, 693.

³ *Supra.*

⁴ *Supra.*

⁵ [1938] A.C. 485: see in particular Lord Wright's speech. I submit that what this case decides is that all that was necessary to justify the claim of State immunity was *de facto* possession of the ship or some other right or interest not necessarily amounting to ownership. Lord Wright's remark at p. 509 is important: 'It must also be noted in the present case that the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land.' See also *The Navemar*, discussed later in this chapter at p. 379 and in particular the passage cited from the judgment of A. N. Hand J., and *Zarine v. Owners of S.S. Ramava: McEvoy v. Owners of S.S. Otto* [1942] Irish Reports, 148.

⁶ [1935] 1 K.B. 140. See *Bohm v. Czerny*, *The Times* newspaper, July 26, 1940, where Simonds J. declined to give effect to a decree made on January 19, 1939, by the appropriate German authorities of the Sudetenland on the ground that it was confiscatory and purported to affect a debt recoverable in England. Apparently the judgment is not based on the fact that the decree was made by a Government which was an enemy Government at the date of the trial. See comment by Abel in *Modern Law Review*, vol. 6 (1941), p. 166.

were in substance seeking to enforce the rights of the Spanish Government under a Spanish penal and confiscatory decree upon securities of the defendant situate in England by obtaining delivery of those securities. The penal law had not operated upon them in Spain, for they had been in England for many years before it had been passed, if indeed they had ever been situate in Spain. Therefore, in the opinion of Lawrence J.,¹ to order delivery to the plaintiffs 'will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic', and he refused to order delivery. This was a case in which, in substance, the English Court was asked, not to recognize and protect rights duly acquired under a foreign law, but actively to enforce the law in England. Lawrence J. cited the words of Lord Loughborough in *Folliott v. Ogden*:²

'The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings in that which he has left, beyond the limits of which such proceedings do not extend.'

Atkinson J. has pertinently pointed out³ that if it be the law that the Spanish decree could not operate directly upon securities situate in this country it was unnecessary to say more and the penal aspect of the decree was irrelevant.

Much of the foregoing authority is *obiter*, but we suggest that while the general principle governing the extraterritorial effect of legislation as stated above is tolerably clear, there was—at any rate until the outbreak of the present war—no direct English judicial authority upon the effect of a foreign law or decree which is not penal or otherwise obnoxious, upon movable property in this country.

So much then for movable property outside the jurisdiction of a foreign Government. Immovable property is governed by the *lex situs* and no foreign law could transfer title to it.

If a summary of the law as it would probably have been stated before the decisions about to be discussed may be hazarded, it is as follows:

(a) An English Court will recognize and protect in England rights duly acquired in a foreign country under a law or a decree of that

¹ At p. 143; and see *Frankfurter v. Exner* [1947] W.N. 210.

² (1799) 1 H. Bl. 124, 135. English Courts are not deterred from enforcing one of our own penal laws by the fact that a foreign country would probably decline to do so: see Younger L.J. in *In re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 527.

country in respect of property situate there at any relevant time (that is, at the date of the coming into force of that law or decree or at some later date while it is still effective) whether the law or decree is penal or otherwise objectionable from the English legal point of view or not.¹

(b) When an English Court is invited to enforce upon property in England rights claimed under a law or decree of a foreign country purporting to have extraterritorial effect, the property not having been situate in that foreign country at any relevant time,

(x) it will *certainly* not do so if the foreign law or decree is penal or otherwise objectionable from the English legal point of view,² and

(y) it will *probably* not do so even if the foreign law or decree is not penal or otherwise so objectionable.³

(c) When an English Court is invited to enforce upon property in England rights claimed under a law or decree of a foreign country not purporting to have extraterritorial effect, the property not having been situate in that foreign country at any relevant time, *cadit quaestio*; the law or decree will not be enforced.⁴

B. *As regards Persons.*

Reg. v. Lesley has already been referred to. Dicey, in the passage cited above, says that a State 'has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory'. Our territorial conception of law is stronger than that of most other countries, and the extent to which British subjects are affected by English law while in foreign countries is small.⁵ For instance, there are very few crimes which, when committed abroad by British subjects, are justiciable in this country: treason, murder, manslaughter, bigamy, piracy and a few others.⁶ But it would not be right to infer from our restricted views as to the exercise of British control of British subjects abroad that English law would regard as illegal and nugatory foreign legislation purporting to exercise more

¹ *A. M. Luther Co. v. James Sagor & Co.* (supra); *Princess Paley Olga v. Weisz* (supra).

² *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* (supra).

³ *Lecouturier v. Rey*; *Sedgwick Collins & Co. v. Russia Insurance Co.* (supra).

⁴ *In re Russian Bank for Foreign Trade* (supra); *The Jupiter* (No. 3) (supra).

⁵ Section 18 of the Military Training Act, 1939, empowered the Crown to apply the Act to certain British subjects ordinarily resident outside Great Britain. The National Service (Foreign Countries) Act, 1942, empowered the Crown by Order in Council to impose military service on British subjects in foreign countries, and Defence Regulations made under the Emergency Powers Act, 1939, may apply to British subjects wherever they may be. See also Merchant Shipping Act, 1894, s. 687, and the Admiralty jurisdiction in regard to offences on the high seas exercised by the Courts of common law.

⁶ Upon the exercise of criminal jurisdiction over foreigners, see Beckett in *British*

extensive control over nationals abroad than we should ourselves claim; for upon the question of extraterritorial jurisdiction over nationals abroad great discrepancy exists among States. Moreover, it may well be that, requisitioning being an act of sovereignty and to some extent based upon personal allegiance, an English Court might be disposed to give effect to the decree of a foreign State purporting to requisition the movable property of one of its nationals in this country upon the ground of the personal jurisdiction exercisable by his State over him in virtue of his allegiance.¹

3. *Decisions during the War of 1939 to 1945*

Several decisions claim our attention. In *Anderson v. N. V. Transandine Handelmaatschappij and Others, The State of the Netherlands Intervening*,² the Supreme Court of the State of New York (County of New York) had to consider the effect upon Dutch assets in that State of the Royal Netherlands Decree of May 24, 1940, made in London, which purported to nationalize and vest in the State of the Netherlands (*inter alia*) cash and securities which belonged to Dutch individuals and corporations domiciled in occupied Holland and were in the hands of American depositors. The object of the Decree, or at any rate one of its objects, was to prevent Dutch assets in neutral countries from falling into enemy hands as the result of actions brought in neutral Courts. The action was brought by an 'assignee for collection' from 'a citizen of a country of Europe, said to be Liechtenstein, . . . now understood to be resident in Cuba . . .' who had deposited certain securities of Netherlands and Belgian companies and cash in Netherlands currency with the defendant company, and, it being alleged that the defendant company had failed and refused to deliver them, the plaintiff claimed to attach, with New York depositaries, the dollar equivalent in value of these securities and that cash. The particular plaintiff's claim may have been made in good faith, but its success

¹ See Holdsworth in 35 L.Q.R. (1919), pp. 12-42.

² 28 N.Y.S. 2d. 547; affirmed by the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on November 14, 1941, and by the New York Court of Appeals on July 29, 1942. 31 N.Y.S. 2d. 194 (263 App. Div. 705); 289 N.Y. 9: *Annual Digest*, 1941-1942, Case No. 4. To the same effect are *Grünbaum v. N. V. 'Oxyde' Maatschappij voor Ersten en Metalen*, New York L.J., August 27, 1941, p. 439, and *Duesterwald v. Lüdwig*, *ibid.* January 15, 1942, p. 215, cited by Jessup in *American Journal of International Law*, xxxvi (1942), pp. 282-288. See also *U.S. v. Pink* (1942) 62 Sup. Ct. Rep. 552, *Annual Digest*, 1941-1942, Case No. 13, and note in 58 L.Q.R. (1942), p. 451, and two more American decisions reported in the same *Annual Digest*, Cases Nos. 171 and 172.

would create the danger that 'fictitious actions will be instituted by the enemy of the Netherlands as a means of siphoning assets out of this country belonging to Netherlands nationals in occupied territory'. The State Department certified that: 'The Government of the United States continues to recognize as the Government of the Kingdom of the Netherlands the Royal Netherlands Government, which is temporarily residing and exercising its functions in London.' (The foregoing extracts come from the Brief for the Intervener, the State of the Netherlands.) Mr Justice Shientag first held that the fact that the Decree was 'promulgated in London, England, rather than at The Hague, is immaterial, in view of the fact that our government has officially recognized the Netherlands Government since its temporary residence in London'. Moreover, according to the affidavit of the Commercial Counsellor of the Dutch Legation in Washington, 'the British Government has stated that so far as is within their province they recognize the Netherlands Royal Decree of May 24, 1940, as a legitimate exercise of the legislative power of the Netherlands'.¹ Later the learned judge pointed out that the 'Decree is a measure of protection, not of expropriation. Its purpose is to conserve, not to confiscate; to protect the rights of the individual, not to destroy them.' Article 5 of the Decree specifically provides for restitution of the nationalized assets to their owners when the present emergency ceases to exist. The learned judge's treatment of the question of giving extraterritorial effect to such a decree is a trifle disappointing from an English lawyer's point of view. Citing American authority to the effect that this question depends upon 'the comity of nations', meaning 'a recognition of fundamental concepts, essential to the proper conduct of foreign relations', he pointed out that the 'clipped sovereignty' of each of the member States imposed upon them the obligation to act with 'full faith and credit' in aid of the international obligations of the Federal State, the United States of America; legislation of the type of the

¹ Quoted in the Brief for the Netherlands Government.

This practice of the 'recognition' by a Government of the decrees of a foreign Government is, I believe, novel and requires a note. It is clearly a political act, and it remains to be seen what amount of weight English Courts will attribute to it. (There is no evidence that such 'recognition' was granted to the Norwegian decree in the *Lorentzen* case about to be discussed.) I suggest that there are two ways in which it might affect a judicial decision: (1) as in *Anderson v. N.V. Transandinne*, where the Court is basing its decision upon the public policy of its own country, of which no clearer evidence could be found; (2) as another illustration of the way in which to an increasing extent our Courts seek and follow the guidance of the Executive in ascertaining or assessing the state of our legal relations with foreign States. (For some instances, see *Annual Digest*, 1925-1926, p. 128, note (d).)

Dutch decree was not contrary to the public policy of the United States or of the State of New York and was indeed in full harmony with the public policy of both with regard to the war then (May 1941) being waged, as was evidenced by the orders 'freezing' the property in the United States of the nationals of the invaded countries.

'The considerations already presented [he continued] justify the conclusion that the Decree is a valid exercise of the sovereign power of the Netherlands, that it covers the property here sought to be attached, that as between the Netherlands nationals concerned and the State of the Netherlands it vests title to such assets in the State of the Netherlands, and that, since the public policy of the Decree is in harmony with the public policy of the forum, the Decree should be upheld by our courts under the principles of comity.'

This judgment was affirmed by the Appellate Division of the Supreme Court on November 14, 1941; its judgment was in turn affirmed by a judgment given by the New York Court of Appeals given on July 29, 1942.¹ By that date the United States of America had entered the war, and the United States Attorney intervened in order to make a statement upon the policy of the United States adopted since their entry into the war and the signing of the Declaration of the United States. That policy is as follows:

'It is the policy of the United States that effect shall be given within the territory of the United States to that [Royal Netherlands] Decree insofar as it is intended to prevent any person from securing an interest in, or control over, assets of nationals of the Netherlands located in the United States on account of claims arising outside of the United States in territory now or at any time under the jurisdiction of the Netherlands Government, for the benefit of persons who are not at the time of their assertion citizens or residents of the United States.'

The Court of Appeals would appear to have taken the view that the decisions of the lower Courts were in harmony with the policy of the United States thus formulated and communicated to it, and the Court agreed 'with the Courts below in their determination of the judicial question that the decree of the Government of the Netherlands is valid and bars a levy upon the property'. It was, therefore, unnecessary for the Court to decide whether the Department of State could by formulating its public policy as to the effect of the Decree transform the judicial question determined by the court below 'into a "political question" which the courts are not empowered to decide or whether the Department of State can in that manner create a public policy of

the United States which supersedes and renders immaterial any public policy of a State'.

The Court of Appeals, like Mr Justice Shientag, relied upon comity.

'By comity of nations, rights based upon the law of a foreign State to intangible property which has a situs in this State, are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the reign of law. The question which the courts below were called upon to decide is whether the sequestration by the government of the State of the Netherlands of property here belonging to its own nationals offends our public policy.'

The Court then pointed out that the challenged decree was not confiscatory, for,

'under its terms, the State becomes in effect a trustee for its subjects of their property which might otherwise be without protection and perhaps subject to seizure by a ruthless enemy.... That enemy is now our enemy. A decree designed for such purposes and having such effect may hardly be said to offend a public policy of this State.'

Perhaps it was easier to arrive at this highly desirable conclusion by means of the theory which adopts international comity as the basis of private international law than it would be by means of the theory, now more prevalent in England, of a mutual recognition and enforcement of acquired rights; for under the latter theory it is a necessary preliminary to shew that there is a right duly acquired under foreign law.

We now come to the decision in *Lorentzen v. Lydden & Co.*,¹ which, though in point of time coming after the first *Amand* case about to be discussed, is closely akin to *Anderson v. N. V. Transandine* and was directly influenced by it. In *Lorentzen v. Lydden & Co.* Atkinson J. had to consider the effect of a Norwegian Order in Council made in Norway on May 18, 1940,² either before, or in the course of, the establishment of the Norwegian Government in England, which purported to vest in a Norwegian Curator (*inter alia*) rights of action for damages for breach of contract belonging to Norwegian shipowners and enforceable in England against British charterers. The learned judge

¹ [1942] 2 K.B. 202; an appeal by the defendants was dismissed by consent (*ibid.* 216); see comment by F. A. Mann in *Modern Law Review*, vol. v (July 1942), p. 262.

² For a Swedish decision upon the requisition of a Norwegian ship while in a Swedish port, see *The Rigmor* discussed later, p. 380.

accepted the opinion of a Norwegian advocate to the effect 'that the Order was properly made in accordance with the Norwegian constitution and was legally binding in Norway and on Norwegian subjects wherever they were', and the Order was not confiscatory but contained a provision for compensation. The learned judge referred to the passage quoted above¹ from Dicey and stressed the proviso 'unless they are its subjects', a point which failed to make any difference in the case of the confiscatory decree under discussion in *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*.² Upon examining a number of the English decisions relating to the Russian nationalizing decrees he found nothing in them which prevented him from giving extraterritorial effect to this Norwegian Order, and he therefore followed the decision in *Anderson v. N. V. Transandine* and upheld the Norwegian Curator's right to enforce the claim of the Norwegian shipowners against the English charterers.³ 'England and Norway', he said, 'are engaged together in a desperate war for their existence... public policy demands that effect should be given to this decree... It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations.' The learned judge, in referring to the passage in Dicey quoted above,⁴ stressed Dicey's qualifications—'speaking very generally' and 'unless they are its subjects'—and it is probable that the true conception of his judgment in this case is that our law is in course of developing yet another exception to Dicey's general principle, namely, that, in time of war when a State is entitled and accustomed to exact the last ounce of service and of property from its nationals, a decree requisitioning the property of nationals in foreign countries is in substance and effect an extraterritorial exercise of power by a State over the persons of its nationals.

Then we come to the *Amand* cases.⁴ *Amand* was a Dutch national who had resided in the United Kingdom for many years, and on or about August 20, 1940, in response to a calling up notice from the Dutch Ministry of Defence based upon a Dutch Decree of August 14,

¹ At p. 362.

² *Supra*.

³ It does not appear that the learned judge's attention was drawn to *The Navemar* and *The El Condado*, which are referred to later at pp. 378–380.

⁴ *In re Amand* [1941] 2 K.B. 239, and *In re Amand* (No. 2) [1942] 1 All E.R. 236 and (on one point only) [1942] 1 K.B. 445; on the question whether an appeal would lie on the refusal of the Divisional Court to grant a writ of *habeas corpus*, see *Amand v. Sec. of State for Home Affairs* [1942] 2 K.B. 26; affirmed [1943] A.C. 147. See comment by Hartmann in *Modern Law Review*, v (July, 1942), p. 256. Reference should also be made to a similar South African decision upon a Dutch decree of February 28, 1941; *Haak and Others v. Minister of External Affairs* [1942] South African Law Reports, Appellate Division, 318.

1940, imposing compulsory military service upon Dutch nationals resident in the United Kingdom, Canada or the United States of America, he reported at Paddington on August 20 and went to a Dutch Army Camp at Porthcawl, after protesting against a refusal to postpone his call for the purpose of attending to his business affairs. He actually served in the Army for some weeks, but, after receiving in February 1941 a week's leave, he declined to return and was soon arrested by the Metropolitan Police in pursuance of a (British) Order in Council made under the (British) Allied Forces Act, 1940; as a deserter from the Dutch Army, and he thereupon applied for a writ of *habeas corpus*.

In the first case the Divisional Court, after holding that he had not become a member of the Dutch Army by voluntary enlistment, decided that his arrest was authorized by the above-mentioned Act and Order in Council and refused his application for the writ. His Majesty's Attorney-General stated to the Court¹

'that the Government of the Netherlands is a Government for the time being allied with His Majesty and established in the United Kingdom; that it is established and exercising its functions in the United Kingdom with the assent and on the invitation of His Majesty's Government in the United Kingdom; and that His Majesty's Government recognize Her Majesty Queen Wilhelmina and her Government as the Sovereign and Government of the Netherlands and as exclusively competent to perform the legislative, administrative and other functions appertaining to the Sovereign and Government of the Netherlands.'

The Court received evidence from Dutch lawyers on behalf of the applicant and the Dutch Government respectively, upon (a) the constitutional validity of the Dutch Decree² and (b) if valid, upon the applicability, according to Dutch law, of such a Decree to Dutch subjects resident outside Dutch territory, and decided that 'the Decree was valid according to Netherlands law, and that it applied to the applicant while resident in this country'. The Court pointed out that the Decree could be applicable extraterritorially without being enforceable extraterritorially, and referred to the passage quoted above³ from Dicey. Enforceability was supplied by the Allied Forces Act, 1940, and the Order in Council made thereunder, so that the applicant's arrest and detention were authorized. The applicant appealed and gave

¹ [1941] 2 K.B. at p. 250.

² Justifying the admissibility of such evidence by reference to *A. M. Luther Co. v. James Sagor & Co.*; *Princess Paley Olga v. Weisz*; and *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*; above, pp. 345, 360-362.

³ P. 362.

notice of his desire to cross-examine the deponents to three affidavits filed on behalf of the Dutch Government before the Divisional Court and to adduce further evidence. The appeal was dismissed—apparently not on the merits but on the ground that the proper procedure was a further application for a writ of *habeas corpus*. Accordingly, a second application¹ for the writ was made, and further evidence was adduced by the applicant. It failed, and substantially on the same grounds. Two points require mention. First, the Divisional Court rejected the argument that it was a breach of our constitutional law for the Crown without the assent of Parliament to permit a foreign Government to exercise its functions in this country and pointed out that the Crown had in no way lessened the sovereignty of the Government of this country. Secondly, the Court held that it had both a right and a duty to investigate the validity of the Dutch Decree—a matter which it will be more convenient to discuss separately and later.²

The main conclusion relevant to the argument of this chapter which we draw from the *Amand* decisions is this. There is a distinction between recognizing the application of a valid foreign law purporting to have extraterritorial effect upon foreign nationals and enforcing it. The Divisional Court, rightly, it is submitted with respect, recognized that a valid Dutch Decree purporting to have extraterritorial effect upon Dutch nationals could take effect upon a Dutch national in this country; this Decree made *Amand* a member of the Dutch Army so that when he declined to return to it he became a deserter; but it was a British Act of Parliament and an Order in Council thereunder that made him liable to arrest and detention and thus enforced the Dutch Decree.³

4. *Constitutionality of the Legislation or Other Official Acts of a Foreign Government*

Let us suppose that by the Constitution of the occupied country whose Government has found a refuge in England a decree purporting to

¹ [1942] 1 All E.R. 236; reported in [1942] 1 K.B. 445, on one point only.

² In the War of 1914 to 1918 a different practice was adopted as between allies upon the liability of their nationals to military service. By a series of treaties which received the force of statute in the United Kingdom by the Military Service (Conventions with Allied States) Act, 1917, allied nationals were reciprocally compelled to serve in the armed forces of the allied State in whose territory they preferred to remain rather than return to their own. *Amand* would have been liable to serve in the British forces as a result of this Act if his country had been an allied State entering into such a Convention.

³ Note the National Service (Foreign Countries) Act, 1942, which empowered the Crown to impose upon British subjects in foreign countries obligations with respect to service in His Majesty's Forces of the like character as were imposed upon them in Great Britain.

have a particular legal effect can only be made in a particular manner, which has become impossible owing to the dispersal of the organs of Government, for instance, the King and the members of the legislature or the King and his Ministers,¹ or at a particular place, for instance, in the metropolitan territory which is wholly occupied by the enemy. Can this objection be taken in an English Court? Is a statement by the dispossessed Government in England to the effect that in the special circumstances of the emergency the decree is valid, conclusive upon the Court? It is proposed to assume that the refugee Government continues to be recognized by His Majesty as the Government of the State which it represents and as exclusively competent to perform the functions appertaining to the Government of that State. That does not carry us the whole way.

We are aware of no direct and unqualified judicial authority on these points. Let us see how near we can get to it.

(a) We submit that the rule illustrated by *A. M. Luther Co. v. James Sagor & Co.* and *Princess Paley Olga v. Weisz*, which prevents an English Court from sitting in judgment upon the substantial validity of the acts of a foreign State, done within its own territory, does not mean that it cannot make inquiry as to the formal validity of those acts and their legal nature; the rule relates to the content of the official act rather than to the ascertainment and competence of the organ from which it emanates and the legal form with which it is clothed.

(b) That it is both the right and the duty of an English Court to inform itself, by evidence as on a question of fact, as to the meaning and purported effect of a foreign statute or decree is abundantly clear,² and a statement by the representative of a foreign Government as to the meaning and effect is not conclusive.

¹ From October 1914 until November 1918 the greater part, but never the whole, of Belgium was under German occupation. The Government was established at Le Havre, the King spent most of the time at his military headquarters in Belgium, and the majority of the members of Parliament remained in their constituencies. The Belgian Congo remained under Belgian control. Though by the Constitution the legislative power is vested in the King, the Senate and the House of Representatives, the Belgian Government in the name of the King issued at Le Havre throughout this period a series of *décrets-lois*—a term unknown to the Constitution. The validity of these *décrets-lois* was invariably recognized by the executive, the judicial, and (after the war) the constitutional legislative, authorities. They were treated as true laws which could only be modified, when the war was over, by laws passed in accordance with the Constitution. See the following decisions: Cour de Cassation of 11 February 1919, 8 February 1920 (*Pasicrisie*, 1920, i, p. 62) and 27 April 1920 (*Pasicrisie*, 1920, i, p. 124).

² Dicey, Rule 204 and notes: *The Jupiter* (No. 3) [1927] P. 122, 138-140; *Russian Commercial and Industrial Bank case* (*supra*). In *Lorentzen v. Lydden & Co.* (*supra*), Atkinson J. admitted the evidence of a Norwegian lawyer upon the constitutionality and effect of the Norwegian 'Order in Council'.

(c) An English Court is under a duty to decline to give effect to a British Proclamation or Order in Council purporting to do something which can only be done by a statute, and, on principle, it should be under the same duty to examine the competence of the organs of a foreign Government in regard to the official act in question. Do the decisions establish this as the rule? In the Russian cases of the past two decades our Courts have come very near to it and have not hesitated to discuss such questions as whether the body responsible for a particular official act possesses administrative or legislative powers.¹ In one case Hill J. expressly rejected the suggestion that the declaration of the representative of a foreign State as to the effect of the action of his Government within its own territory was binding upon him.² Nevertheless, there can be no doubt that an English Court would feel bound to attach great weight to a statement made, say, by or on behalf of the Minister of Justice of a foreign Government, particularly when, as in the case of some countries, it is one of the recognized duties of the Minister of Justice to answer inquiries concerning the law of his country.³

(d) Perhaps the nearest approach to a decision upon this matter which our Courts have been compelled to make occurred in the second *Amand* case.⁴ There the constitutionality of the Dutch Decree imposing compulsory military service upon a Dutch national who had resided in England for thirteen years was challenged by him upon the ground that in six respects⁵ it contravened articles of the Constitution of the Netherlands State.⁶ The Divisional Court, rejecting the argument of the Dutch Government, supported by the English Attorney-General,

¹ See the *Russian Commercial and Industrial Bank* and *Princess Paley Olga* cases (*supra*).

² *The Jupiter* (No. 3) [1927] P. 122, 138-140.

³ For an instance of an affidavit by a foreign ambassador as to the validity of the requisition of a ship by his Government, see *The Kabalo* (1940) 67 Ll. L. Rep. 572. In *The Cristina* [1938] A.C. 485, 506, Lord Wright said: 'It is unnecessary here to consider whether the Court would act conclusively on a bare assertion by the [foreign] Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondent here has established the necessary facts by evidence.'

⁴ *In re Amand* (No. 2) (*supra*).

⁵ [1942] 1 All E.R. at p. 243, including the point that the Decree was issued outside the Netherlands.

⁶ With regard to the objection—perhaps the most difficult—that the Netherlands Constitution contained no provision allowing the imposition of conscription by decree instead of by statute, it is worth mentioning that an English Court would be aware of the facts that in this country the King wages war under the royal prerogative which arms him with exceptional powers and that he has a common law power, not affected by the Bill of Rights, of raising and maintaining an army in time of war. As already mentioned (p. 373) our Government had recognized Queen Wilhelmina and her Government in England as possessing

that these questions could not lawfully be investigated, examined the Decree in relation to each¹ of the articles of the Constitution which it was alleged to contravene and upheld its constitutionality. But the special grounds upon which the Court considered itself to be justified in following this course must be noted. Wrottesley J.'s main ground was that the Decree 'deals with the freedom of a person living in this country within the protection of the Crown'; Croom-Johnson J.'s ground was the same; Cassels J. mentions the same ground and the peculiar fact that the foreign Government was by reason of emergency temporarily established in this country, and was also 'impressed by the fact that the Netherlands courts no longer function'. All three learned judges refer to the absence of express authority.

We submit, therefore, that the decision in the second *Amand* case must be limited to the peculiar facts of that case and is not authority for the general proposition that an English Court must, when called upon to do so, examine the constitutional validity of a foreign decree or other official acts. We suggest, however, that the balance of authority at present is in favour of the existence of such a right and duty, though it must be admitted that there is much to be said for the view that, when the Minister of Justice or other appropriate officer of a duly recognized Government produces an enactment in Court and states that it is formally and constitutionally valid according to the law of his country an English Court ought to accept that statement unless and until the enactment has been pronounced to be invalid by the Courts of that country.

5. *The Position of Ships*²

Merchant ships form so important a part of the resources of maritime countries, particularly in time of war, that their position deserves separate treatment.³

Some of the decrees of the allied Governments are concerned with the control and requisitioning of their merchant ships. Apart from the general rules (discussed in the previous section) relating to the control of a Government over the assets of its nationals situated in foreign

(*inter alia*) the legislative functions of the Sovereign and Government of the Netherlands—which perhaps does not include the power to amend the Constitution.

¹ Except that I do not find any discussion of the point referred to in footnote 5 on p. 376.

² See note 5 on p. 365 above.

³ See an article by Professor Holdsworth, 'The Power of the Crown to Requisition British Ships in a National Emergency', in 35 *L.Q.R.* (1919), pp. 12-42, and an article by the present writer on the Requisitioning of Merchant Ships in *Journal of Comparative Legislation*, 3rd Ser., vol. 27 (1945), pp. 68-78, reprinted in Appendix IV to this book, pp. 443-447.

countries, is there anything peculiar arising from the intrinsic character of merchant ships? Our Courts have not yet said their last word upon this matter, and the available authority, such as it is, must be examined.

There is a considerable amount of authority in favour of the existence of a rule that the essential nature of merchant ships and their peculiar connexion with the State whose flag they fly keep them notionally within the territorial jurisdiction of the flag State, wherever physically they may be. (It is unnecessary and, what is more important, erroneous, to call them floating portions of that State's territory.¹ That is a dangerous and misleading metaphor, and, if it corresponded with truth, would exclude foreign merchant ships from the jurisdiction of any State in whose ports they may be.) The following cases may be referred to:

In *The Cristina*,² Lord Wright expressly left open the question of the existence of any such rule; it was unnecessary to decide the point because the Spanish Republican Government had obtained possession of the ship—rightly or wrongly—and to have allowed the shipowner's action for the recovery of possession to proceed would have been to allow that Government to be impleaded.³

In *The Navemar*⁴ the existence of such a rule was plainly asserted by a United States Circuit Court of Appeals which upheld the operation, upon a Spanish merchant ship in the port of Buenos Aires, of a decree issued by the Spanish Republican Government on October 11, 1936, expropriating merchant ships, with the result that she became a Spanish public ship and acquired immunity from process in the

¹ Even more so than in the case of public ships. After the opinion of the Privy Council delivered by Lord Atkin in *Chung Chi Cheung v. The King* [1939] A.C. 160, let us hope that this metaphor is dead.

² [1938] A.C. 485, 509, where he said that 'the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land': see *British Year Book of International Law*, 1938, p. 244, n. 3.

³ *The Cristina* was followed on this point in *Pankos Operating Co. v. M. V. Janko* (otherwise *Norsktank*) by the United States District Court for the Eastern District of New York and by the Circuit Court of Appeals in February 1944 reported in 77 Ll. L. Rep. 386 and 546.

⁴ (1937) 59 Ll. L. Rep. 17; *Annual Digest*, 1938-1940, Case No. 68 (with note); see also Hyde in *American Journal of International Law*, xxxiii (1939), pp. 530-534, and two articles by Preuss, *ibid.* xxxv (1941), pp. 263-281 and xxxvi (1942), pp. 37-55, from which it appears that the U.S.A. Courts incline to the view that, for the purpose of requisitioning, merchant ships are 'quasi-territorial', so that the requisitioning of a ship outside the territorial waters of the requisitioning State 'is not an extraterritorial exercise of state authority'. In one case it was said that 'jurisdiction over ships 'partakes more of the characteristics of personal than of territorial sovereignty'—that is, personal allegiance rather than territoriality. And see *Furness, Withy & Co. v. Rederiaktiebolaget (sic) Banco* [1917] 2 K.B. 873; *Belgian Government v. The Lubrafol* in *Annual Digest*, 1941-1942, Case No. 37.

American Courts. The decision is based upon the peculiar character of a ship which is 'considered, constructively at least, as part of the territory of the Sovereign whose flag it flies, and is subject, while on the high seas or in foreign territorial waters, to the jurisdiction of that Sovereign'. No question arose as to the area of Spanish territory then controlled by that Government. The Supreme Court reversed the decision of the Circuit Court of Appeals on the ground that it had not been proved that possession of the ship or the right to it was in the Spanish Republican Government and that she was not as such immune from process, but it also held that the Spanish Ambassador should be permitted to intervene 'for the purpose of asserting the Spanish Republican Government's ownership and right to possession'. Thereupon the case again came before a District Court,¹ which rejected the claim of the Spanish Republican Government on the ground that the decree of expropriation was confiscatory and penal and therefore could not successfully be asserted in an American Court; on appeal from this decision it was held² by the same Circuit Court of Appeals that the decree was effective to transfer the title in and right to possession of the vessel to the Spanish Republican Government. After observing that the question whether compensation for the expropriation was payable or not did not matter, the Court said:

'In the present case, we are not enforcing claims of another State to property beyond its jurisdiction, as would have been the case if the subject-matter had been a chattel that was within the State of New York when the appropriation became effective. The situation here resembles that of the appropriation of tangibles within the confines of Spain which afterwards reached our shores. There we should recognise the title acquired under the laws of the foreign State... In either situation the decree of the foreign State is recognised as passing title because jurisdiction is held to exist. When the Spanish decree became effective as to the *Navemar*, she was on the high seas and recognition of it involved no conflict with our laws. *Crapo v. Kelly*, 16 Wall. 610, 631, 632.'³

¹ (1938) 62 Ll. L. Rep. 76.

² (1939) 64 *ibid.* 220. Note that A. N. Hand J., after citing Lord Wright in *The Cristina* [1938] A.C. 485, said at p. 225 (col. 1): 'It is not necessary to say that the decree effected an expropriation of the vessel while she was in foreign territorial waters at Buenos Aires, though it was promulgated and notification thereof was given when the ship was at that port. Even if the decree might not be effective while the *Navemar* was at Buenos Aires, nevertheless it was an instrumentality of expropriation that would become operative upon the vessel as soon as she reached the high seas'—meaning, it is suggested, 'operative as a matter of Spanish (Republican) law'.

³ See *The Adriatic*, *Annual Digest*, 1919-1922, Case No. 9, and *Fields v. Predionica I Tkanica* (1942) New York Sup. Ct. (App. Div.) 265 A.D. 132; *Annual Digest*, 1941-1942, Case No. 55.

In *The El Condado*¹ the Court of Session had to consider whether a decree of the Spanish Republican Government of June 28, 1937, purporting to requisition all vessels registered at Bilbao (as the vessel was), could take effect upon a Spanish merchant ship lying in Scottish waters. Upon a variety of grounds (to which the following lines do not attempt to do justice) the Lord Ordinary (Lord Jamieson) and all the members of the Second Division rejected the argument that the decree operated upon this ship in Scottish waters, and the variety of reasons underlying their several judgments on this point must be summarized *only in so far as relevant to our present enquiry*. Lord Jamieson,² apparently treating the Spanish Decree as confiscatory, declined to give effect to it as regards property situated outside the territory of the Government issuing the Decree (*semble*, at the time when the Decree became or remained operative). The Lord Justice-Clerk (Aitchison) regarded the Decree as 'not confiscatory or penal in the full sense', and, relying upon *The Jupiter* (No. 3),³ held that the ship 'was moveable property that was outwith the territory and jurisdiction of the foreign sovereign state, and, having been so at the date of the decree, it was not capable of being affected by the requisition'.⁴ Lord Mackay⁵ referred to 'a most emphatic train of eminent English judges in favour of the view that such "decrees" of a foreign country as purport to have extraterritorial effect, and to attach property in a subject situated, and at a time when it is situated, within this country or its territorial waters, will not be recognized by our laws and Courts'. Lord Pitman⁶ refused to recognize the validity of the requisition. Lord Wark,⁷ without referring to the question whether the Decree was penal and confiscatory or not, stated that the Scots law was the same as the English law on the matter, held that such a Decree could have 'no effect whatever upon moveable property, including ships, outwith the territory' of the Government issuing it, and cited the passage in Dicey which we have quoted above.⁸

In a case⁹ which concerned a Norwegian tanker, the *Rigmor*, and

¹ *Government of the Republic of Spain and Another v. National Bank of Scotland* [1939] S.C. 413; 63 Ll. L. Rep. 83, 330; *Annual Digest*, 1938-1940, Case No. 77; *The Sendefa*, *ibid.* 1935-1937, Case No. 74. These two volumes of the *Annual Digest* contain many cases arising out of events in Spain.

² [1939] S.C. at p. 421.

³ [1927] P. 122; *ibid.* 250.

⁴ [1939] S.C. at p. 427.

⁵ At p. 433.

⁶ At p. 436.

⁷ At p. 438.

⁸ P. 362.

⁹ *Annual Digest*, 1941-1942, Case No. 63; *American Journal of International Law*, xxxvii (1943), pp. 141-151, and *The Solgry* in the same Court in forthcoming supplementary *Annual Digest*, 1919-1942.

the parties to which included His Britannic Majesty's Government, the Norwegian Government and the Waages Tankrederei A/S of Oslo, the Supreme Court of Sweden on March 17, 1942, upheld the requisition by the Norwegian Government under a decree of May 18, 1940, of this Norwegian ship then lying in a Swedish port. Upon the requisition being notified to him the Norwegian master of the ship attorned to the Norwegian Government as represented by its Legation in Sweden, so that the Norwegian Government thus acquired possession of the ship in law and in fact. The Norwegian Government later leased the ship to the British Government, represented by the Ministry of War Transport, by means of a demise charter, as the result of which so the Court held, she passed into the possession of the British Government. The Norwegian owners, carrying on business in Oslo and doubtless under constraint by the German occupying Power, instituted these proceedings for the purpose of preventing the British Government from removing the ship from Swedish waters, and the question, not here relevant, was the validity of the claim of State immunity advanced by the British Government upon the basis of its actual and lawful possession. This claim was upheld. In the course of its judgment the Supreme Court upheld the requisition in the following passage:¹

'In the case under consideration the transfer of possession to the Royal Norwegian Government entailed the carrying into effect of a State process of requisitioning. It follows from the nature of such a process that the carrying into effect can occur even without the collaboration of the owner of the requisitioned object, and this will particularly be the case if the owner is in territory occupied by an enemy State. It is true that the carrying into effect within the territory of another State cannot take place under compulsion and be legally binding. But if, as in the present case, it takes place with the consent of the immediate possessor and especially if the latter is a subject of the requisitioning State and holds the position of captain of the vessel affected by the requisitioning, it can only be regarded as not legally binding on the assumption that the decree on which the execution is based is such that because of its departure from the fundamental principles of the law of our country it ought not to be taken into account. This cannot be said to be the case with the Norwegian requisitioning decree.'

Dicey, in his Appendix, Note 29 (II), cites a certain amount of authority for the view that for the purpose of the voluntary transfer of merchant ships they must be regarded as having a *situs* in the country to which they 'belong'.

¹ At p. 149.

We have already seen (p. 365) that the statement of Hill J. in *The Jupiter* (No. 3) that 'If the *Jupiter* was not within the territory of the R.S.F.S.R. [at any material date], I do not see how the mere passing of a decree could transfer the property', was doubly *obiter*.¹

Thus the question of the extraterritorial operation of legislation upon privately-owned merchant ships cannot be regarded as settled. It is clear that for many purposes such a ship carries the law of her flag State with her, and it would not be surprising if this body of law included legislation involving a compulsory change of ownership. So far at any rate as the Crown is concerned, the statutory power of requisitioning ships in times of national emergency is wide,² but, of course, that does not involve the proposition that other countries enforce our municipal powers of requisitioning to the full extent or that we enforce theirs. Nevertheless, the requisitioning by a State of merchant ships flying its national flag while in foreign ports is now becoming frequent and widespread, and it would not be surprising if this practice were upheld by British and other Courts.³

6. *Changes made in the Law by the Dispossessed Government during the Occupation*

The question arises whether the sovereign of enemy-occupied territory can effectively make during the occupation changes in that large portion of his law which remains in force therein notwithstanding the occupation. Could the Norwegian Government during the recent occupation make a decree (valid in other respects) changing the law of succession, by will or an intestacy, to movables or immovables in Norway? Supposing during 1914-1918 the Belgian Government had changed the law relating to sale of goods, bankruptcy or wills, would that change have operated only in non-occupied Belgium or also in occupied Belgium? It is at any rate arguable that, assuming the new law to fall

¹ In *The Arantzazu Mendi* [1939] A.C. 256 it was unnecessary to decide whether this Spanish ship registered at Bilbao could effectively be requisitioned (1) while outside Spanish territorial waters by the Republic Government after Bilbao had been captured by the Franco Government, or (2) by the Franco Government while lying in a British port. What mattered was that the proceedings instituted by the Republican Government for the purpose of obtaining possession of the ship impleaded the Franco Government and therefore had to be set aside. And see the remarks by Lord Wright and A. N. Hand J. above at pp. 378-9.

² Note that section 3 of the Emergency Powers Act, 1939, applies to 'all British ships or aircraft, not being Dominion ships or aircraft, wherever they may be', and see Regulation 53 thereunder.

³ See above, p. 377, n. 3. For a French decision arising out of the recent Spanish Civil War, see *Lafuente v. Llaguno y Duranona*, *Annual Digest*, 1938-1940, Case No. 55, and a Bermuda decision of 1939, *The Cristobal Colon*, see *American Journal of International Law*, xxxix (1945), p. 839.

within the category of that large portion of national law which persists during the occupation and which the enemy occupant cannot lawfully change or annul, it ought to operate in occupied territory in spite of the absence of power to make it effective during the occupation.¹

We are aware of no British authority, but there is a little foreign authority available and, since the governing principle rests upon a rule of public international law, it is useful to know how the Courts of other countries understand that rule. The following decisions support the contention suggested above.

De Nimal v. De Nimal, Brussels Court of Appeal, *Annual Digest*, 1919-1922, Case No. 311 (suspension of periods of limitation and prescription in civil matters).

Stasiuk v. Klewec, Polish Supreme Court, *ibid.* 1927-1928, Case No. 380 (Austrian decree changing rules of Austrian Civil Code governing the competence of witnesses to a will: effect upon Austrian territory in Russian occupation).

The following decision is contrary to the contention:

Greek Court of Thrace, 1930. *Annual Digest*, 1929-1930, Case No. 292 (decree prohibiting sale of property in occupied territory).

The following decisions are relevant:

Auditeur Militaire v. Van Dieren, Belgian Council of War, *Annual Digest*, 1919-1922, Case No. 310, the note upon which tells us that 'an uninterrupted series of decisions recognizes the obligatory force in the occupied territory of the orders of the Belgian Government'.²

Kulturas Balss Co-operative Society's Case, Latvian Senate, *ibid.* 1919-1922, Case No. 321.³

¹ In *Public Prosecutor v. Reidar Haaland*, 9 August 1945, the Supreme Court of Norway enforced the death penalty for treason in pursuance of a law enacted by the Norwegian Government in exile. [To be reported in *Annual Digest*.]

² See the Belgian decrees regulating the transfer of the domicile of Belgian companies to other countries quoted in *Owners of M.V. Lubrafol v. Owners of S.S. Pamia* [1943] 1 All E.R. 269.

³ Many decisions upon belligerent occupation are cited by Feilchenfeld, *International Economic Law of Belligerent Occupation*, and see Robinson, 'Transfer of Property in Enemy Occupied Territory', in *American Journal of International Law*, xxxix (1945), pp. 216-230.

CHAPTER 19

THE EFFECTS OF PEACE TREATIES UPON PRIVATE RIGHTS

In this chapter¹ we shall consider and state the effects upon private rights of treaties of peace, or, more precisely, of some of the normal contents of treaties of peace. We are not concerned with the automatic consequences of the coming into force of a treaty of peace, namely, the cessation of the operation of the many rules of law which affect the nationals and residents of a country upon its passing from a state of war into a state of peace.

We shall deal with the following topics:

- A. Summary of public international law.
- B. Territorial changes.
- C. Change in nationality—plebiscite—options.
- D. Change in domicile.
- E. The scope of the power of a State to affect the private rights of its nationals.
- F. Effect upon nationals of third States.
- G. How far a peace treaty concluded by the British Crown involves legislation.
- H. The relation of the British Crown to its subjects in regard to a peace treaty.

A. SUMMARY OF PUBLIC INTERNATIONAL LAW²

It will be convenient to begin by stating in summary form the general effects resulting from the coming into force of a treaty of peace apart from any special stipulations which it may contain. Hostilities cease, if indeed they have not already ceased as the result of a general armistice. Certain pre-war rights of action, as we have already seen,³ once more become enforceable. Normal peaceful intercourse is resumed, and usually diplomatic intercourse and the mutual exercise of consular functions begin once more. Enemy nationals who have been interned are released and in many cases are compulsorily repatriated. Prisoners

¹ Reprinted from *Cambridge Law Journal*, vol. vii (1941).

² The legal position which resulted from the Declaration of the Unconditional Surrender of Germany of June 5, 1945, is entirely different from that which normally intervenes between a general armistice and a peace treaty: see above, p. 354, note 2.

³ Chapter 4.

of war are repatriated as soon as possible. In the absence of contrary stipulations, (a) there is an amnesty as between each belligerent on the one hand and its opponent and that opponent's nationals on the other for all wrongful acts committed during the war and incidental to the war, but not of course for other wrongful acts, e.g. murder or larceny committed by a prisoner of war; and (b) what are sometimes called 'war crimes' by individuals can no longer be punished, and 'war criminals' must be released—at any rate if they have not yet been convicted.¹ Enemy private property which has not been confiscated but merely taken into custody will, apart from any different provision made by the treaty, be restored. Merchant ships and cargoes which have been formally condemned by a Prize Court are not restored to their former owners, and (though the matter is not free from controversy) merchant ships and cargoes may be the subject of proceedings in prize even after the conclusion of peace, provided the incriminating acts were completed before that time.

Many private rights depend upon the existence of treaties. The effect of peace upon pre-war treaties between the belligerents is closely connected with the effect of the outbreak of war upon those treaties.² The fact that, after a war, the future treaty relations between the parties are now usually dealt with by the treaty of peace makes it difficult to state a general rule of law. But if a generalization is to be hazarded, it would be that—apart from express stipulation in the treaty of peace—treaties which were abrogated by the outbreak of war, for instance, political treaties, do not revive, and that treaties merely suspended resume their operation. It should be added that many permanent rights of individuals, particularly those connected with property or status, arising from treaties, are not affected by the outbreak of war between the parties to those treaties; in these cases the treaty had already taken effect by creating the private rights, and it is unnecessary to inquire what the effect of the war or the peace on the treaty may be.

It is hardly necessary to state that most of the matters referred to in this section are regulated in detail by a modern treaty of peace.

B. TERRITORIAL CHANGES

International law recognizes two distinct kinds of interest in regard to immovable property—the *imperium* or sovereignty which belongs to the State, and the *dominium* or property which belongs to the

¹ See generally on the matter, Oppenheim, ii, §§ 257, 272–284, and p. 477, n. 2.

² Upon the whole subject, see Oppenheim, ii, § 99, and McNair, *Law of Treaties*, chap. 44.

individual, or frequently to the State in its capacity as landowner; for instance, Crown land in England. It is believed that most municipal legal systems reflect this distinction. It is therefore necessary to inquire which of these interests is affected by a treaty of cession, and the answer is that *prima facie* what a State transfers when it cedes territory by a treaty of peace (or a treaty of cession based on some other motive such as sale or exchange), is *imperium*, not *dominium*. Nevertheless a State may by express terms cede both *imperium* and *dominium*, and there is at any rate one case on record where a State ceded *dominium* without ceding *imperium*; by Articles 45 to 50 of the Treaty of Versailles (with their Annex) Germany ceded to France 'in full and absolute possession, with exclusive rights of exploitation, unencumbered and free from all debts and charges of any kind, the coal mines situated in the Saar Basin as defined in Article 48'.¹ What Germany ceded was *dominium*, taking it away in the few cases where it was privately owned, from the owners of the coal mines, and the Annex provided that, if eventually, as the result of a plebiscite, the Saar Basin was returned to Germany, she would have to buy back the coal mines from France. As to the *imperium*, 'Germany renounced in favour of the League of Nations, in the capacity of trustee, the government of the territory defined above' (Article 49), and until the reunion with Germany the *imperium* was probably either in suspense or distributed in various hands.

English decisions. The English authority is scanty and somewhat unsatisfactory.² It can fairly be summarized by saying that cession does not *per se* affect private property, immovable and movable, within the ceded territory, and that the State acquiring the territory *ought* not to act to the detriment of the owners of that property; but, if the British Crown upon acquiring territory by cession were so to act, its action would be an 'act of State' and no municipal tribunal would be capable of dealing with the matter. Lord Halsbury L.C. in delivering the opinion of the Privy Council in *Cook v. Sprigg* said:³

'It is no answer to say that by the ordinary principles of international law private property [certain concessions of rights in regard to land] is respected by the sovereign which accepts the cession and assumes

¹ By section 1 of the Annex the deposits of coal, together with plant, equipment, etc., became 'the complete and absolute property of the French State'.

² *Nabob of the Carnatic v. East India Company* (1791) 1 Ves. Jun. 371; (1793) 2 Ves. Jun. 56; *Secretary of State for India v. Kamachee Boye Sahaba* (1859) 13 Moo. P.C. 22; *Doss v. Secretary of State for India* (1875) L.R. 19 Eq. 509; *Cook v. Sprigg* [1899] A.C. 572; *West Rand Central Gold Mining Co. v. Rex* [1905] 2 K.B. 391. For the 'act of State' aspect, see below, section H.

³ [1899] A.C. 572, 578.

the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has power to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.'

American decisions. The American authority is clear. In *United States v. Soulard*,¹ arising out of the cession of Louisiana, Chief Justice Marshall said:

'In the treaty... the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term 'property', as applied to lands, comprehends every species of title inchoate or complete....'

In *United States v. Percheman*² the same learned Chief Justice had to consider the effect of the cession of Florida by Spain to the United States by treaty in 1819. Although the treaty contained stipulations relating to the titles to lands in the ceded territory, his remarks upon the general rules governing cession are valuable in view of the great authority attaching to his judgments. He said:

'It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?..... A cession of territory is never under-

¹ (1830) 4 Peters' Reports, 511.

² (1833) 7 Peters' Reports 51; see also *Ely's Administrator v. United States*, 171 U.S. 220, 223. Abundant American authority will be found in Moore, *Digest of International Law*, § 99. And see Sayre in *American Journal of International Law*, xii (1918), pp. 475-497.

stood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede....

This doctrine was approved by the Transvaal Concessions Commission¹ in 1901, and Chief Justice Marshall was cited. The Commissioners stated that they were 'unable to perceive any sound distinction between a case where a State acquires part of another State by cession and a case where it acquires the whole by annexation'.

Permanent Court of International Justice. In the case of the *German Settlers in Poland*² in 1923 the Permanent Court gave an Advisory Opinion which, while the occasion for it arose upon the Treaty of Versailles of 1919 and other treaties, contains remarks upon the general law which would prevail in the absence of treaties. The Court had to consider the rights of German settlers in the territory ceded to Poland holding land from the Prussian Government under certain contracts and leases the precise nature of which it is unnecessary to state here, and said:

'Private rights acquired under existing law do not cease on a change of sovereignty.... Even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.... No treaty provision is required for the preservation of the rights and obligations now in question.'

It would perhaps be more realistic to say that cession, while transferring *imperium*, does not *per se* affect *dominium*; for once the cession has taken place the *dominium* is at the mercy of the new sovereign and cases have occurred in which, in spite of treaty obligations purporting to protect the old proprietor under his new sovereign, his land has been confiscated with little or no compensation, for instance, in pursuance of a policy of establishing a system of peasant proprietorship.

C. CHANGE IN NATIONALITY³

We shall see that States parties to a peace treaty may validly bind themselves to dispose of the private property of their nationals in a high-handed manner. The same is true of their power to affect the national status of their nationals *in invitum*. One of the attributes of sovereignty

¹ Cited by Pitt Cobbett, *Leading Cases on International Law* (5th ed.), ii, p. 303.

² Publications of the Court, Ser. B, No. 6, pp. 36, 38.

³ The matter is discussed in great detail by Keith, *Theory of State Succession* (1907), chap. vi. See also Mann in *Modern Law Review*, v (1942), pp. 218-224, and Graupner in 61 *L.Q.R.* (1945), pp. 161-178.

being the allegiance of those persons who possess the nationality of the sovereign, it follows that a cession of the sovereignty over a particular area of territory involves *per se* a transfer to the acquiring State of the allegiance and nationality of those nationals of the ceding State who at the time of the cession are connected by a certain tie with the territory ceded. Whether that tie is residence alone or domicil alone or a combination of both is controversial, and it is possible that it may depend upon the laws of the two States respectively, for it cannot be said that more than a small portion of the field of nationality is at present regulated by public international law. Dicey, in the case of the cession of British territory (Rule 38), and the acquisition of foreign territory by the Crown (Rule 26), confines the change of nationality to nationals of the ceding States who are 'resident', and says that in the latter case it is uncertain whether the nationality of persons domiciled but not resident at the time of the cession becomes British.¹

Nor is it clear whether the nationals of the ceding State who are resident or domiciled in the ceded territory can avoid the change of nationality by quitting the territory ceded immediately after the completion of the cession. Westlake² says that upon the cession of British territory British nationals lose their British nationality 'unless they transfer their domicile to some territory which remains British, either within the time limited for that purpose by the treaty, or immediately if no such time be limited'. Dicey³ assumes that nationals of the ceding State who continue to reside on territory ceded to the Crown become British.

The hardship of an involuntary change of nationality has led with increasing frequency in recent years to the adoption of one of the following forms of mitigation:

(a) *Plebiscite*. The treaty may stipulate for the cession of particular pieces of territory to depend upon the result of a plebiscite by the nationals of the ceding State inhabiting the territory; such a provision occurs in several articles of the Peace Treaties of 1919-1920, but it was not generalized;

(b) *Option of nationality*. The treaty may give the nationals of the ceding State inhabiting the territory ceded an option to retain the nationality of the ceding State; if they exercise that option, the acquiring State may, in default of contrary stipulation, expel them as any aliens may be expelled;

¹ See Borchard in *American Journal of International Law*, xxxvii (1943), pp. 634-640.

² *Private International Law* (7th ed. Bentwich), § 299. ³ Comment on Rule 26.

(c) *Option to emigrate.* The treaty may give the inhabitants an option to emigrate within a certain time and also retain their nationality.

The growth of the principle of self-determination tends to favour the adoption of one or more of these palliatives. It must, however, be emphasized that the law does not enjoin them and they do not apply unless the high contracting parties choose to adopt them.

D. CHANGE IN DOMICIL

Domicil, unlike nationality, is not a political conception and is independent of a person's nationality or change of nationality.¹ Suppose that an American citizen with a domicil in Massachusetts becomes naturalized as a British subject after the necessary period of residence in England. His change of nationality does not change his domicil,² though the adoption of British nationality may be a factor in deciding what his domicil is by throwing light upon his intention as to where his home is.³

Suppose X, a British subject, to be domiciled in a British West-Indian island, which is ceded by the British Empire to Mexico. In default of any power to opt to retain his nationality, he loses his British nationality and becomes a Mexican national. He remains in the island. What happens to his insular domicil? To-day the island has its own legal system, is a 'country' in Dicey's sense of the term—'a territory subject to one system of law'. If Mexico maintains that system of law without change, we apprehend that X's domicil remains that of the island. If Mexico changes the legal system by incorporating the island in its own territory, what is the position? Dicey tells us (Rule 4) that 'a domicil' once acquired 'is retained until it is changed in the case of an independent person by his own act'. X's relation to the insular territory remains the same both in fact and intention, but the legal system under which he is living has been changed *in invitum*; instead of being that of the island, it is now that of Mexico. We are not aware of British authority, but we suggest that he acquires the domicil attaching to Mexican territory. A domicil he must have, and he can only have one (Rules 2 and 3). What else can it be? There is no longer

¹ *Udny v. Udny* (1869) L.R. 1 Sc. App. 441.

² *Wahl v. A.-G.* (1932) 147 L.T. 382.

³ In *Murray v. Parkes* [1942] 2 K.B. 123, 130. Viscount Caldecote C.J. said: 'Domicil is wholly different from nationality, and in my opinion is not even a relevant consideration in determining a man's nationality.' Nevertheless, in case of cession or annexation, it may become necessary to consider the effect of the change of sovereignty upon persons domiciled in the territory ceded or annexed but not resident there at the relevant date: see Dicey, p. 160.

any such thing as the insular domicil. It has been extinguished by act of law.

E. THE SCOPE OF A STATE'S POWER TO AFFECT THE PRIVATE RIGHTS OF ITS NATIONALS¹

It has often been said that the more elementary a proposition of law is, the more difficult it is to find specific authority for it. It is nevertheless sometimes possible to prove a proposition by the citation of a number of decisions which can only be justified on the assumption that it is valid.

It appears that international law treats a State as being invested for international purposes with complete power to affect by treaty the private rights of its nationals, whether by disposing of their property, surrendering their claims, changing their nationality or otherwise. (Similarly a State can by treaty acquire rights for its nationals, but it would be out of place here to inquire whether these rights can be directly conferred upon and enforceable by those nationals or can only be enforced by their State on their behalf.)

Many instances of the exercise of this power are to be found in the peace treaties concluded at the end of the War of 1914-1918.

In *The Blonde*² Lord Sumner, delivering the opinion of the Privy Council, said:

'There can be no doubt that Germany was competent, on behalf of those nationals who were German subjects within the operation of the Treaty, to make cessions which would bind them and effect a transfer of their rights of property, as if the cession had been made personally by the owner concerned.'

And later³ he referred to the necessity of ascertaining 'that the private party claiming [the release of a prize] is a party presently entitled, who has not, by his own act or by the public act of those who bind him, been divested of his rights of ownership or of possession'.

In another prize case, *The Bathori*,⁴ Lord Merrivale said:

'All that is necessary to establish in favour of the Procurator-General the first of the contested propositions—namely, that the plaintiff-owners of the *Bathori* are within the terms of the Treaty of Trianon,

¹ See McNair, *Law of Treaties*, chap. 29. For a critical commentary on the relevant provisions of the Treaty of Versailles, see Schuster in *British Year Book of International Law*, 1920-1921, pp. 167-189.

² [1922] 1 A.C. 313, 335.

³ At p. 337.

⁴ [1933] P. 22, 37; affirmed on another ground [1934] A.C. 91.

is to show that they, at the date of the treaty, were within the prescribed category 'nationals of the former Kingdom of Hungary or companies controlled by them' as to whose possessions under the control of the Allied and Associated Powers Hungary and the Powers could make agreements of valid dispositive effect.'

And the voluminous decisions upon the Peace Treaties given by English Courts after the War of 1914-1918 are based upon the assumption of the validity of a general power in a State by treaty to dispose of the property of its subjects, though it must in fairness be admitted that, although that is the assumption upon which they are based, they are for the most part decisions upon the numerous Treaty of Peace Orders made under corresponding Treaty of Peace Acts which are binding upon British Courts, whether or not as a matter of public international law a State has power to dispose of the private property of its nationals situate outside its jurisdiction.

Certain further questions arise:

(a) At what date must the persons whose rights a treaty purports to affect be the nationals of a State party to the treaty?

It is believed that, with the possible exception to be mentioned, the persons whose rights a State purports to affect by treaty must be its nationals at the time when the treaty comes into force. Thus it would be absurd that if a year ago I became naturalized in the United States of America and thus lost my British nationality, and then I bought a ship registered in an American port, the British Government should be able to make a valid transfer of that ship by treaty. But supposing that while a British subject I sustained an injury at the hands of a foreign State and then ceased to be British, could the British Government validly surrender my claim against the foreign Government, on the ground that my injury is really the injury of my country sustained in the person of one of its subjects?¹ These questions were referred to in *The Bathori*² but it was unnecessary to decide them. The doctrine of the continuous nationality of claims seems to suggest an answer in the negative.

(b) Is it necessary that the nationals whose rights the treaty purports to affect should at the date when the treaty comes into force be domiciled within the territory of their State?

Certainly not, if the decisions upon the peace treaties are any guide. In countless cases the ex-enemy nationals whose 'property, rights and

¹ See the *Mayrommatis Case*, Publications of the P.C.I.J. Ser. A, No. 2, p. 11.

² *Supra*. And see an analysis of this case in *British Year Book of International Law*, 1934, pp. 172-178.

interests' were subjected by those treaties to a charge in favour of the British Government and appropriated by that Government were domiciled in this country; though, as has been pointed out, these provisions acquired statutory effect by means of the Treaty of Peace Acts and Orders and therefore could not be questioned in British Courts.

(c) How far is the location of the property which the treaty purports to affect relevant upon the effectiveness of the treaty?

It is believed that a State can validly bind itself by treaty to transfer to another State property of any kind belonging to its nationals, whether that property be situate within the territory of the transferor State or not. Undoubtedly a State can compulsorily acquire the property of its nationals, with or without compensation, and it is not surprising that international law should regard it as capable of alienating that property by treaty. This power seems to be based upon the ownership of its nationals rather than upon the physical situation of the property within the State's territory. If the property transferred is located within the territory of the transferor State or the transferee State there is no difficulty. If it is located within the territory of a third State, and the private owner is recalcitrant and declines to hand it over, and the Courts of that State at the suit of the transferee State refuse (as is probable) to compel him, the difficulty is insurmountable, but that fact does not necessarily prove that such property is legally inalienable by the transferor State.

Numerous instances of the transfer of private property by treaty will be found in Part VIII (Reparation) of the Treaty of Versailles of 1919.

When the treaty specifies the location of private property transferred, as, for instance, where by Article 297 of the Treaty of Versailles Germany agreed that the Allied and Associated Powers should have the right to 'retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates...', questions will arise as to the location in point of law of different kinds of property. In solving these questions an English Court could be expected to apply the English rules of the Conflict of Laws as to the location of property. Thus in *The Bathori*¹ it was held by Lord Merrivale P. that a claim in prize to damages for wrongful destruction was 'property' within a provision similar to that cited above and was located in the country where it could be enforced.²

¹ *Supra*.

² See *Sutherland v. Administrator of German Property* [1934] 1 K.B. 423 (C.A.).

Immovable property. We have already seen in the case of a small portion of the coal mines located in the Saar Basin which were transferred by Germany to France an instance of an 'out-and-out' transfer of private property, an instance which is the more remarkable because the disposal of the overriding *imperium* in respect of the whole territory cannot be described as 'out-and-out' transfer.

Debts and other choses in action. There are points in connexion with the locality of choses in action which are still not clear, though the broad principle is that a chose in action is located in the country in which it is enforceable. The editor of Dicey makes two comments upon the locality of choses in action which are transferred by peace treaties:

'The most conspicuous recent recognition of the fact of the local situation of choses in action is that contained in the Orders in Council issued under the treaties of peace appropriating the property of foreign nationals within the British dominions [i.e. British territory]. In no case has it been possible to escape the operation of these Orders by asserting that choses in action are without situation, and, therefore, are not touched by the legislation. In place, efforts have been directed to establishing the true local situation of the various choses in action.'¹

Again, in commenting upon Rule 153: 'An assignment of a movable which cannot be touched, i.e. of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt) [and made therein] is valid', he says:² 'the whole mass of cases of expropriation of German and other enemy property illustrates the principle', i.e. that an assignment which gives a good title according to the *lex situs* is valid. He cites by way of illustration *Favorke v. Steinkopff*,³ where the right of a German national to receive an annuity out of a trust fund held by British trustees in England under an English will was 'property, rights or interests' within British territory and passed under the Treaty of Versailles to the British Government, because it would be necessary for the annuitant if he wished to enforce his chose in action to sue in England. Thus the statute under which the Treaty of Peace Order was issued gave to the British Government a good title to the chose in action.

Ships seem to require special mention.⁴ In their case the power of a State to transfer by treaty is probably wider than in the case of other

¹ Note 29, p. 992.

² At p. 615, note (e).

³ [1922] 1 Ch. 174.

⁴ The peculiar position of ships has also been discussed earlier, pp. 377-382.

property. It is instructive to look at Annex III in Section I of the Reparation Part (VIII) of the Treaty of Versailles:

1. The German Government, on behalf of themselves and so as to bind all other persons interested, cede to the Allied and Associated Governments the property in all the German merchant ships which are of 1,600 tons gross and upwards....

3. The ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German flag; or (b) are owned by any German national, company or corporation, or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals....

It is understood that Germany requires, and required in 1919, that ships flying her flag should be the property of German nationals, so that ships all falling under (a) and some ships falling under (b), are within the principle, submitted above, to the effect that a State can validly bind itself to alienate the property of its own nationals. The extension of the power to cover property within the control of its nationals is not unreasonable. But there are some States which permit their flag to be flown by ships belonging wholly to aliens. Has such a State power to bind itself by treaty to alienate such ships flying its flag? It is believed that the answer is in the affirmative. International law does not dictate to States the conditions in which they should permit the use of their flag, but it is vitally interested in the flag because it is the flag and the State jurisdiction which it involves that ensure that there shall be law and order upon the high seas and not anarchy. The fact that a flag subjects a ship to the jurisdiction of the flag State and to a large part of the law of that State, regardless of the ownership of the ship, invests the State with a peculiar degree of power over the ship, wherever she may be, and there can be little doubt that the flag State could validly bind itself to alienate such ships. A ship is in many respects unlike other chattels.¹

Surrender of claims. Not only can a State bind itself by treaty to alienate the property of its nationals; it can surrender their claims either against the other contracting party (in which case they may also be its own claims for injuries sustained by it in the persons of its nationals) or against the nationals of that party; it can accept for them any restrictions and disabilities in the way of trading or otherwise. In fact, the principle would appear to be that it can bind itself by treaty

¹ See above, p. 377, and Appendix, pp. 433-447.

to affect the rights of its nationals, both proprietary and personal, in whatever way a State can affect the persons and things subject to its sovereignty. Supposing a State agreed by treaty to make a capital levy amounting to fifty per cent. upon all property belonging to its nationals, and to transfer the proceeds to the other contracting party, that treaty would be binding even though it would be necessary for the paying State to alter its laws before it could fulfil the treaty. The power of a State to transfer the allegiance and change the nationality of its subjects has already been referred to.¹

German Property in Switzerland. See note on p. 402.

F. EFFECT UPON NATIONALS OF THIRD STATES

That a peace treaty does not normally affect the private rights of nationals of non-contracting parties is merely an example of the general principle *pacta tertiis nec nocent nec prosunt*. Thus when two Frenchmen in 1925 sued a German national for a balance of a pre-war debt in Switzerland, where he was living, and it was objected that the action was incompetent by reason of the Clearing Office procedure set up by Article 296 of the Treaty of Versailles for the purpose of settling claims between French and German nationals, it was held by the Swiss Federal Court that a treaty to which Switzerland was not a party could not operate to withdraw an action otherwise competent from the Swiss Courts.² And the German Reichsgericht in 1934 held³ that a German national could recover a credit balance from a Danish bank, although the bank had in April, 1918, i.e. before the Treaty of Versailles, paid over the balance to a French Administrator who had been appointed (apparently) to carry out the liquidation of the assets of German nationals carrying on business in France. A full report is not available to us, but it appears that the defendant bank invoked Article 297 of the Treaty of Versailles by way of retrospective validation of the liquidation of the assets of the German national. Since, however, that Article referred only to the 'property, rights and interests' of German nationals *within Allied territory*, and the credit balance was located in Denmark, the provisions of the treaty did not extend to it.

Where, however, a national of a neutral State living in the territory of a party to the Treaty of Versailles, for instance, a Norwegian living in England, owed a sum at the outbreak of war to an Austrian com-

¹ Section C of this chapter.

² *Trampler v. High Court of Zürich*, *Annual Digest*, 1925-1926, Case No. 265. See also *Deutsche Bank v. Zirini*, *Annual Digest*, 1919-1922, Case No. 235.

³ *M. v. Aktieselskabet K.H.*, *Annual Digest*, 1933-1934, Case No. 217.

pany, and after the war was sued in England by the Austrian company and the British Administrator of Austrian property, the latter recovered; the debt was locally situated in England and was the property of an Austrian company; therefore it was competent to Great Britain and Austria to agree by treaty upon its disposition. This view appears to be entirely in accordance with English principles of the conflict of laws, for the property was situated in England.¹

G. HOW FAR A PEACE TREATY CONCLUDED BY THE BRITISH CROWN INVOLVES LEGISLATION

In the British Empire the treaty-making power resides in the Crown acting under the royal prerogative upon the advice of one of His Majesty's Governments. The Crown is responsible for the negotiation, the signature and, when necessary, the ratification of treaties. Parliament does not ratify treaties, but when a treaty requires for its application and enforcement in the United Kingdom some change in or addition to the law administered in our Courts or the acquisition by the Crown of some new powers not already possessed by it, or when it involves the incurring of some financial obligation, it is necessary for Parliament to legislate to this end in order that the treaty may be observed. Moreover, when a treaty involves the cession of British territory there is a practice, now amounting probably to a constitutional convention, whereby the treaty receives the approval of Parliament expressed in a statute.²

If we apply these principles to modern peace treaties, we shall find several reasons why legislation is required.

(a) *Impounding or confiscation of enemy private property.* According to English law, the outbreak of war does not *ipso facto* operate to vest enemy private property situate in this country in the Crown. On several occasions during the War of 1914 to 1918 it was asserted by the highest judicial authority that the practice of confiscating private enemy property in time of war was obsolete.³ This is controversial, but at any rate there is little doubt, so far as England is concerned, that there is no automatic confiscation, and that if the Crown desires to confiscate enemy private property it must resort in each case to the ancient process of 'inquisition of office', which was described by Warrington

¹ *Josef Inwald A.G. v. Pfeiffer* (1928) 43 T.L.T. 399; 44 T.L.R. 352 (H.L.).

² The preceding statements are somewhat dogmatic. For argument and illustrations see McNair, *Law of Treaties*, chap. 2. See also Holdsworth, 'The Treaty-making Power of the Crown', in 58 L.Q.R. pp. 175-183.

³ See the authorities collected in Oppenheim, ii, § 102, n. 3.

L.J. as 'inconvenient and expensive', and, moreover, only available before the conclusion of peace.¹ Accordingly, if the United Kingdom Government decided to confiscate enemy private property in this country and to insist upon a stipulation in the peace treaty recognizing the confiscation, it would almost certainly ask Parliament to pass the legislation required to enable this to be done by administrative action.

As during the War of 1914 to 1918, so during the recent war enemy private property could be vested in pursuance of the Trading with the Enemy Act, 1939,² in a Custodian of Enemy Property 'with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace'. These provisions are protective, not confiscatory, and further legislation would be required if it was decided to confiscate the property in the hands of the Custodian.

(b) *Debts and other claims.* The effect of the outbreak of war is to suspend, not to destroy, debts to, and accrued claims by, enemies which are being or are capable of being recovered or enforced in British Courts,³ and in many foreign countries the legal effect is the same or similar. By 'enemies' is meant in this country not enemy nationals but an enemy State, or any person resident or carrying on business in enemy or enemy-occupied territory, or any body of persons incorporated under the laws of an enemy State or controlled by enemy persons, that is, broadly speaking, enemies in the territorial sense.⁴ Accordingly, the moment a state of war has ceased, the *status quo ante* revives, and the Courts of the ex-belligerents are, in the absence of contrary provisions,⁵ once more open to the now ex-enemy litigant.⁶ This may be considered undesirable and is likely to lead to much congestion. The peace treaties of 1919-1920 averted much of this result by devising procedure which was partly administrative and partly judicial. The administrative part consisted of Clearing Offices set up in each ex-belligerent country, and the judicial part consisted in the creation of Mixed Arbitral Tribunals to which certain of the claims not settled by agreement between the Clearing Offices

¹ *In re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107, 139; above, pp. 125, 126.

² S. 7. The formula was different in the Trading with the Enemy Acts of the War of 1914 to 1918.

³ Above, pp. 101-107.

⁴ The statutory definition will be found above, pp. 74-81.

⁵ Whether during the war time runs under the Limitation Act, 1939, or not, is controversial: see above, pp. 74-81.

⁶ See Annex xvi (Contracts, Prescription and Negotiable Instruments) to the Treaty of Peace with Italy, 1947, and corresponding Annexes to the Treaties with Roumania, Bulgaria, Hungary and Finland (all in Cmd. 7022).

were referred and which applied the law relevant to the claim in question, subject to any modification of it by the treaty.¹ The fact that the Anglo-German Mixed Arbitral Tribunal was not dissolved until 1932 is some measure of the amount of litigation which was thus withdrawn from the ordinary Courts of law.

It is obvious that treaty provisions of this nature deprive persons of the right to litigate in British Courts and therefore require legislation.²

(c) *Pre-war contracts.* If the parties to the peace treaty desire to modify the effects of the outbreak of war which are recognized by their respective legal systems and which would be applied by their respective Courts, or to clarify the relevant law, they will insert the necessary provisions in the peace treaty. Here again, if any change in English law is involved, legislation is required. Many illustrations will be found in Articles 299 to 303 (with Annex) of the Treaty of Versailles, entitled 'Contracts, Prescriptions and Judgments'.

(d) *Miscellaneous.* The dislocation of commercial intercourse which results from a modern war on a large scale is so enormous that it is virtually impossible to clear up the debris by resort to the normal legal machinery, and it will usually be found to be essential that the peace treaty should create its own code for the purpose. For instance, the Treaty of Versailles contains Articles dealing with patents, trade-marks, designs and copyrights.

H. THE RELATION OF THE BRITISH CROWN TO ITS SUBJECTS IN REGARD TO A PEACE TREATY³

The treaty-making power of the Crown is an exercise of the royal prerogative. Subject to the general control exercised by Parliament

¹ This is a popular statement of the effect of some very complicated and detailed provisions of the peace treaties. The procedure referred to applied, in general, to debts and claims as between the nationals of one ex-belligerent residing in its territory and the nationals of an opposing ex-belligerent residing in its territory, that is, the tests of nationality and residence were combined.

² Although it has nothing to do with debts and claims, it is worth noting that the British Government appears to have taken the view in 1935 that the Treaty of Peace Act, 1919, section 1 of which empowered His Majesty to 'make such Orders in Council, and do such things as appear to him necessary for carrying out the said Treaty and for giving effect to any of the provisions of the said Treaty', enabled the Crown by Order in Council to apply economic sanctions against Italy in the Ethiopian dispute under Article 16 of the Covenant (and of the Treaty); see Oppenheim, ii, § 52*d*, n. 4, on p. 135, and United Nations Act, 1946.

³ On the whole subject, see Harrison Moore, *Act of State in English Law*, *passim*, and in particular chapters VIII, XIII and XIV, and McNair, *Law of Treaties*, chap. 29.

over the Executive, there is probably no sphere in which the royal prerogative is more active in modern times than the sphere of foreign relations—the making of war and peace, the acquisition of new territory, the cession of British territory (subject probably to the constitutional convention mentioned in section G), and the conduct of intercourse with foreign Powers. The consequence is that, although a treaty involving a change in or addition to our law cannot be carried out without the aid of a statute, the Crown is largely free from the control of the Courts of law in the making and the carrying out of a treaty. If the aid of the Courts is invoked, it is sometimes said that the making of the treaty or the acquisition or cession of territory is an ‘act of State’ and not cognizable by the Courts, though in this connexion ‘act of State’ does not mean the same thing as it does when used to defeat a claim made by a non-resident alien upon the Crown.¹

Two types of case may be referred to as illustrations:

(i) In the first it is sometimes alleged that the Crown, by acquiring new territory, either by annexation or cession, has become liable upon obligations which bound the former sovereign of that territory. In *Cook v. Sprigg*,² which arose out of the acquisition of Eastern Pondo-land, apparently by cession from its paramount chief, the Privy Council advised the Crown that, even if the Prime Minister of Cape Colony (to which the ceded territory was annexed) could be sued under a Cape Colony statute, no action would lie against him at the suit of the holders of concessions from the former sovereign of the territory.

‘The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State... It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.’

This opinion was followed by the King’s Bench Division in *West Rand Central Gold Mining Co. v. Rex*,³ where a British company unsuccessfully sought by petition of right to recover compensation against the Crown in respect of gold seized before the outbreak of war by the Government of the South African Republic, whose territory had been

¹ *Buron v. Denman* (1848) 2 Ex. 167.

² [1899] A.C. 572, 578.

³ [1905] 2 K.B. 391.

annexed by the Crown upon the subjugation of the Republic. There was no treaty in the international sense.

And an important extra-judicial confirmation of the same is to be found in a passage contained in the Report of the Transvaal Concessions Commission¹ appointed in 1900:

'It is clear that a State which has annexed another State is not legally bound by any contracts made by the State which has ceased to exist, and that no Court of law has jurisdiction to enforce such contracts if the annexing State refuses to recognize them.'

(ii) In the second type of case an attempt has been made to subordinate acts and omissions by the Crown within this domain of 'act of State' to the jurisdiction of the Courts by alleging that the Crown in making a treaty acted as the trustee or agent of a class of persons of whom the suppliant is a member. In *Rustomjee v. The Queen*² a British subject brought a petition of right against the Crown to recover a sum of money which he alleged to be due to him as a Chinese merchant and to have been received by the Crown from the Emperor of China in pursuance of a treaty between them. In dismissing the petition in the Court of Appeal, Lord Coleridge C.J. said of the Queen:

'She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing it, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts.... We do not say that under no circumstances can the Crown be a trustee; we do not even say that under no circumstances can the Crown be an agent; but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever.'

The same device was attempted by the suppliant in *Civilian War Claimants Association v. The King*,³ in which an attempt was made by assignees of the claims of certain civilian sufferers, in person or in property, from enemy air raids and bombardment during the War of 1914 to 1918 to recover from the Crown a rateable proportion of the sums received by the Crown from Germany on account of reparations in pursuance of the Treaty of Versailles. On demurrer by the Crown, the petition was dismissed by the judge of first instance, the Court

¹ Parliamentary Papers, South Africa, 1901 (Cd. 623), cited in Pitt Cobbett, *Leading Cases and Opinions*, ii (5th ed.), p. 303.

² (1876) 1 Q.B.D. 487; 2 Q.B.D. 69, 74.

³ [1932] A.C. 14.

of Appeal and the House of Lords, following the *Rustomjee* case and expressly repudiating the doctrine of agency or trusteeship.¹

In 1928 the German Reichsgericht² came to a similar conclusion upon certain provisions of the Treaty of Versailles (Articles 74 and 297 (i)), whereby Germany agreed with the other contracting parties that she would compensate her own nationals in respect of the retention and liquidation of their assets in Allied territory by the Allied Governments.³

¹ See Lord Atkin [1932] A.C. at p. 26. See also for an allegation that a foreign Government is acting as agent or trustee for its nationals, *Administrator of German Property v. Knoop* [1933] 1 Ch. 439.

² *Annual Digest*, 1927-1928, Case No. 281. See also *ibid.* 1919-1922, Case No. 233.

³ See also the following: *Vajesingji Joravarsingji v. Sec. of State for India* (1924) 51 I.A. 357; *Administrator of Hungarian Property v. Finegold* (1931) 47 T.L.R. 288; *Administrator of Austrian Property v. Russian Bank for Foreign Trade*, *ibid.* 550 and 48 T.L.R. 37 (C.A.); *Hoani Te Heuheu Tokino v. Aoetea District Maori Land Board* (1941) 57 T.L.R. 419; *Sec. of State for India v. Sardar Rustam Khan*, *ibid.* 534.

NOTE ON GERMAN PROPERTY IN SWITZERLAND

In May 1946 the Swiss Government and the Governments of France, the United Kingdom and the United States of America made an Agreement (Cmd. 6884) on this matter. The Allied Governments claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority within Germany and sought the return of gold stated to have been wrongfully taken by Germany from the occupied countries during the war (mainly gold belonging to the Belgian Government) and transferred to Switzerland to the Swiss National Bank. There were two distinct claims, the first relating to private, the second to public, property. The Swiss Government 'while unable to recognize the legal basis of these claims', was desirous of contributing to the reconstruction of Europe by making certain payments. As regards the looted public gold they agreed to pay 250 million Swiss francs in gold in New York. The private property 'owned or controlled by Germans in Germany', as defined in the Agreement, the Swiss Government undertook to 'liquidate' and of the proceeds one-half will go to the Allied Governments and the other half will be retained by the Swiss Government which will, through the Office Suisse de Compensation, indemnify the German owners 'in German money'.

It has been suggested that the legal basis of the claim of the Allied Governments—not admitted by the Swiss Government—was that there was no German Government, that the Allied Governments were for the time being invested with supreme governmental authority over Germany and German nationals and their property wherever situate and that their powers were not limited to those of a belligerent occupant. For the Swiss official account of the transaction, see *Message du Conseil fédéral à l'Assemblée fédérale concernant l'approbation de l'accord financier conclu à Washington*; no. 5047 of June 14, 1946; for a British view, see *The Economist*, May 25, 1946, p. 835.

Upon the legal character of the present Allied occupation of Germany, see above, p. 354. An Agreement has been made between certain Allied Governments and the Swedish Government regarding German assets in Sweden, but it has not yet been published in the United Kingdom.

And see the Inter-Allied Declaration of January 5, 1943 (Cmd. 6418) against Acts of Dispossession committed in Territories under Enemy Occupation or Control.

APPENDIX I

HISTORICAL SURVEY OF PROCEDURAL STATUS OF ALIEN ENEMIES¹

In this appendix it is proposed to review very briefly the principal landmarks in the growth of the plea of alien enemy until comparatively recent times.

From the Norman Conquest onwards a stream of foreigners poured into this country, but so vast were the dominions within which a man could be born and yet be a subject of the English king that the question of alien status was not very likely to arise.² It is not until the kings of England begin to lose their Continental dominions and English nationality becomes more limited in its sphere and more clearly defined that the law is forced to deal with these problems.

Magna Carta (c. 41) confers certain privileges and protection upon alien merchants, *praeterquam in tempore gwerre, et si sint de terra contra nos gwerrina*, though even they are merely to be detained upon the outbreak of war *sine dampno corporum et rerum* until information be received of the satisfactory treatment of English merchants in the enemy country, in which case the enemy merchants *salvi sint in terra nostra*, and are presumably allowed to remain.

Here at any rate is a suggestion, though not for procedural purposes, of the difference between an alien enemy and an alien friend.

A similar notion of reciprocity occurs in a case in the year 1220 where in answer to a claim of dower the defendant pleads, successfully, that he need not answer, because the plaintiff is

'de potestate Regis Francie et residens in Francia, et provisum est a consilio domini Regis quod nullus de potestate Regis Francie respondeat in Anglia, antequam Anglici respondeantur de iure suo in terra Regis Francie et ipsa nullam mananciam habet in partibus istis',³

¹ Based on articles by the author in 31 *L.Q.R.* (1915), pp. 154-169 and 34 *ibid.* (1918), pp. 134-142. And see Holdsworth, *History of English Law*, ix, pp. 91-104 and Baty in 31 *L.Q.R.* (1915), pp. 30-49. Much information upon the historical treatment of actions by alien enemies and their property will be found in two articles by Farrer in 37 *L.Q.R.* (1921), pp. 217-241 and 337-362.

² Pollock and Maitland, *History of English Law* (2nd ed.), i, p. 460.

³ Bracton's Note Book, case 110; see also cases 730 and 1396 and Bracton, *De legibus et consuetudinibus*, fos. 415b, 427b. And see Holdsworth, *History of English Law*, ix, p. 92.

which is more than a mere plea of *alien nee*. It has been pointed out¹ that throughout the whole of the first half of the thirteenth century 'a permanent relation of warfare' existed between England and France despite occasional truces. It can hardly be claimed that this is a clear instance of the plea of alien enemy. If that were so, there would be no question of reciprocity. Further, it is not clear whether the order of the *consilium domini Regis* was *ad hoc* or declaratory. Nevertheless, it shows that (1) the law is prepared to allow some sort of *exceptio* to defeat the claims of an alien enemy, and (2) a distinction exists in point of procedural capacity between the alien enemy and the alien friend, a fact which makes it more difficult to understand the temporary eclipse of that distinction which is about to follow. Pollock and Maitland attribute this eclipse to the growth of a national sentiment and a general detestation of foreigners caused by a plague of royal favourites from the Continent. Whatever the cause may be, it seems probable, despite the existence of statutes giving aliens the right to a jury *de medietate linguae*,² that until the middle half of the fifteenth century there was little need to make any distinction for forensic purposes between alien friends and enemies. The status of the former was quite precarious enough. Littleton's treatise makes this clear.³

It is interesting to note the context of Littleton's passage upon aliens. He tells us that there are 'six manner of men who if they sue, judgment may be demanded if they shall answer'. The first is the villein suing his lord, the second the outlaw, the fourth the man against whom judgment has been given in a *praemunire*, the fifth one who 'is entred and professed in religion', the sixth one who is excommunicated by the law of Holy Church.

'The third is an Alien, which is born out of the ligeance of our Sovereign Lord the King; if such Alien will sue an action real or personal, the Tenant or Defendant may say, that he was born in such a country which is out of the King's Allegiance, and ask Judgment if he shall be answered.'⁴

Coke's comment may be interpolated here:

'*Real or personal*. In this case the law doth distinguish between an Alien, that is a Subject to one that is an Enemy to the King, and one that is Subject to one that is in League with the King: And true it is that an alien Enemy shall maintain neither real nor personal Action,

¹ Pollock and Maitland, *op. cit.* i, p. 461.

² See note, p. 94, Thayer's *Evidence at the Common Law*.

³ Litt. 198; Co. Litt. 1294 and b.

⁴ § 198.

donec terrae fuerint communes,¹ that is, until both Nations be in Peace; but an Alien that is in League shall maintain personal actions; for an Alien may trade and traffick, buy and sell, and therefore of Necessity he must be of Ability to have personal Actions; but he cannot maintain either real or mixt Actions. An alien that is condemned in an information, shall have a writ of error to relieve himself. . . .²

And later he says:³

'And ask judgment if he shall be answered. So as the Tenant or Defendant shall neither plead Alien nee to the Writ or to the Action but in Disability of the Person, as in case of Villenage or Outlawry before. And Littleton is to be intended of an Alien in League; for if he be an alien Enemy, the Defendant may conclude to the Action.'

Meanwhile, before Littleton wrote, the distinction between alien friend and alien enemy has reappeared, and in the year 1453 we find a defendant in an action of trespass to the house of an alien pleading 'that the plaintiff is and was on the day of the purchase of the writ an alien born in the said town of L. under the allegiance of the King of Denmark who is enemy to' the King of England.

'Trespas fuit port vs. un J. d's m'an debruse. Wangford. Nous dioms que le plaintife est alien nees a L. hor del legiance le roy et demand judgement de brief. *Littleton.* Le plee va al accion et il conclud. al brief. *Wangford.* Dites que vous voilles. *Littleton.* Al plee pled par le maner. *Ashton.* Si un alien come Lumbard, Galiman, ou tiel marchant qui vient icy per licence et safe conduit et prent cy en Londres ou ailours un meason pur le temps si ascun debruse le meason et prent les biens il a accion de trespas; mes sil soit enemy le roy et viei eins sans licence ou safe conduite auter est. Et puis a auter jour le def. dit que le plaintife est et fuit jour d. brief purchase un alien nees en le dit ville de L. de south le legiaunce le Roy de Denmarke que est enemy a etc et demand judgement si accion.'⁴

Again, in 1480 there is a case which may be regarded as the foundation of the statements in the Abridgements.⁵ A large part of the discussion turns upon whether a state of war is a question of fact or depends upon a formal declaration, but it is agreed that an action of *Dette sur Obligioun* will not lie at the suit of an alien born under the

¹ See note on this expression, Pollock and Maitland, *op. cit.* vol. 1, p. 462, n. 1.

² Co. Litt. 129b. See Holdsworth's comment upon these passages cited from Littleton and Coke, *op. cit.* ix, pp. 94, 95. It is possible, if not probable, that Littleton was in error as to personal actions. Pollock and Maitland, *op. cit.* i, p. 459, regarded Coke's modification of Littleton as 'a bold treatment of a carefully worded text'.

³ § 129b.

⁴ Y.B. Hil. 32 Hen. VI, f. 5.

⁵ Y.B. Hil. 19 Edw. IV, f. 6.

allegiance of an enemy of the king. 'Si un que est south lobediens le enemy le roy ad un obligacioun fait a luy, ceo est ousterment void.' Upon the question of what will happen to the obligation there is no agreement, but Brian J. thinks the king will have it.

Brooke quotes this case in several passages,¹ and is followed by later abridgers. For instance, Rolle² puts it in the form of three propositions.

'If a man is bound to an Alien Enemy, it is void against the person bound. So if a man is bound to an Alien Amie who afterwards becomes an Enemy, it is void against him. But in both cases the King will have it [i.e. the bond] "*sed quaere*".'

Dyer³ reports a decision of the Court of King's Bench in 1514 in which it was held that

'notwithstanding he is an alien, yet he shall be received in all personal actions, if there be no war between this realm and the kingdom to which the alien belongs, &c., for then he is an enemy of our lord the king, in which case he shall have no benefit from his laws'.

The plea is now becoming well recognized, for Brooke (Nonabilitie 62) tells us that in 1547 (in trespass)

'fuit dit que alien nee nest plee sil ne dit ouster que le plaintiff est de allegiance dun tiel enemy le roy in transgression, car nest plee in actione personal vers alien qui est de allegiance de tiel prince qui est de amity le roy'.⁴

What has happened to Littleton's doctrine now?

In 1552, so we are told by Benloe,⁵ it was 'the opinion of the Justices of the Common Bench that an alien who is not an enemy of the King can have goods and leases in England and can make a will of them although he is not a denizen'; and in 1589 we find the plea of alien enemy successful in defeating in an action of debt an alien enemy administratrix, 'for the Court will not suffer that any enemy shall take advantage of our law'.⁶

It seems, therefore, that we can state that by the end of the sixteenth century it was clearly recognized that the plea of alien enemy was good in personal actions. In real actions it was not necessary.⁷

The next phase will shew that the law recognizes alien enemies and

¹ Dette, 219; Denizen and Alien, 16, 20; Obligation, 54; Travers *per sans ceo*, 307.

² i, 195.

³ Vol. i, 2b, 6 Hen. VIII.

⁴ See also Brooke's *New Cases*, 13.

⁵ 10.

⁶ Owen, 45. Also reported Cro. Eliz. 143. Contrast *Brocks v. Phillips*, Cro. Eliz. 684. The case of *Watford v. Masham*, Moore (K.B.) 431, can only be explained by supposing the omission of a negative.

⁷ See Co. Litt. 129b, and his explanation of Littleton.

alien enemies. They are not all tarred with the same brush, or rather some are more heavily tarred than others. In the celebrated *Calvin's case*¹ we are told that

'if this alien becomes an enemy, (as all alien friends may) then he is utterly disabled to maintain any action, or get any thing within this realm. And this is to be understood of a temporary alien, that being an alien may be a friend, or becoming a friend may be an enemy'.

In other words, enemy status may come and go. But there is another distinction, of importance for the future:²

'The third kind of enemy is *inimicus permissus*, an enemy that cometh into the realm by the King's safe conduct, of which you may read in the Register, fol. 25, Book of Entries, Ejectione Firmæ, 7, 32 Hen. 6. 23b, &c.'

The modern law may fairly be said to begin with the case of *Wells v. Williams* (1697).³ We have reached the point at which the plea of alien enemy is sufficient to prevent an alien enemy from suing, though, in spite of one or two indications, it is not yet clearly established whether the disability admits of any exceptions, and, if so, what they are.⁴ In *Wells v. Williams* (an action on a bond) it was held that an alien enemy living here by the King's licence and under his protection may bring an action of debt upon a bond:

'Though the plaintiff came here since the war, yet if he has continued here by the king's leave and protection ever since, without molesting the Government or being molested by it, he may be allowed to sue, for that is consequent to his being in protection.'

But, per Treby C.J., 'an alien enemy abiding in his own country cannot sue here'.

If he came before the war no safe conduct was necessary, and it is not entirely clear from the reports that a safe conduct was essential during the war. This case is also interesting as affording an early instance of the recognition of 'friendly enemies', namely, the French Protestants who were excepted by the King in his declaration of war.

¹ (1608) 7 Rep. 17a.

² *Ibid.* 18a.

³ 1 Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34. Dr Baty has expressed the view that this case was decided on the ground of the indulgence accorded to the resident Protestant subjects of Louis XIV.

⁴ Holdsworth, *op. cit.* ix, pp. 98, 99, says that it was never definitely settled 'whether an alien enemy, who was an executor or an administrator to a subject, could sue in his representative capacity'. See the cases collected, *op. cit.* p. 99, n. 1, and above, p. 48 of this book.

Five years later, in *Sylvester's case*¹ we are told:

'If an alien enemy come into England without the Queen's protection he shall be seized and imprisoned by the law of England and he shall have no advantage of the law of England, nor for any wrong done to him here; but if he has a general or a special protection, it ought to come of his side in pleading.'

The nature of the action does not appear, but alien enemy was held to be a good plea in abatement.

In *George v. Powel* (1717)² (a case of *Indebitatus Assumpsit* for money lent) there was a discussion of the question how the plea of alien enemy should be pleaded, when in bar and when in abatement, and a replication that 'the plaintiff was at the time of the promises, and now remains in this Kingdom, by licence and protection of the King', was held good.

The rule of disability received an extension in the year 1794 in the case of *Brandon v. Nesbitt*.³ There the plaintiff was a British subject who had effected an insurance policy as agent for an alien enemy principal. The principal was indebted to the agent in a sum which exceeded the amount claimed on the policy, so that 'the money... when recovered will not go out of the kingdom (as was supposed) to strengthen the hands of the enemy, but will be retained here by the plaintiff by way of set off'. Lord Kenyon C.J. held, however, that 'an action will not lie either by or in favour of an alien enemy'. The proceeds of a judgment, though lawfully intercepted by the British agent, would nevertheless enure to the benefit of the enemy principal.

In 1799, so firmly established is the disability of the alien enemy that Lord Stowell, in *The Hoop*,⁴ actually bases the prohibition of trading with the enemy (*inter alia*) on the procedural disability of the alien enemy:

'Another principle of law... forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our own country applies this principle with great vigour. The same principle is received in our courts of the law of nations; they are

¹ (1702) 7 Mod. Rep. 150.

³ 6 T.R. 23.

² Fortescue, 221.

⁴ 1 C. Rob. 196, 201.

so far British courts, that no man can sue who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*; But otherwise he is totally *exlex*.¹

Later he quotes Bynkershoek to the effect that 'legality of commerce and the mutual use of Courts of Justice are inseparable'.² It is doubtful whether the learned judge is historically correct in basing the prohibition of intercourse upon the procedural disability, for the prohibition is certainly as old as the thirteenth year of Edward II's reign (2 Rolle's Abridgement 173, *Guerre*), when the enemy was Scotland, and there are other grounds which can claim consideration.³

The reports during the Napoleonic wars afford many instances of the operation of the plea of alien enemy both against alien enemies and against persons suing on their behalf.⁴

Before leaving this historical survey, we must notice the one decision of note contributed by the South African War, *Janson v. Driefontein Consolidated Mines Limited*,⁴ though its main importance lies in the realm of contract rather than of procedure. In that case the Courts had to deal with an action brought against a London underwriter during the war by a company registered under the laws of an enemy State and carrying on business in enemy territory. Lord Lindley said:⁵

'But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts. . . .'

The learned Lord of Appeal was speaking of contractual capacity, but we think it is fair to say that he had in mind capacity to enforce rights under a pre-war contract. At any rate his statement is equally true of procedural capacity. There is one peculiarity in this case which should be noted but not imitated. It was an action instituted during the war by an enemy in the territorial sense to enforce a pre-war obligation, for the claim on the policy had accrued before the war

¹ See Schuster's reference in *British Year Book of International Law*, 1920-1921, p. 183, to Mendelssohn-Bartholdy's opinion (not available to me) as to Lord Stowell's alleged misquotation of Bynkershoek in this case. See above, p. 90, n. 2.

² See *Porter v. Freudenberg* [1915] 1 K.B. 857, 867, 868 and *Rodriguez v. Speyer Brothers* [1919] A.C. 59, 115.

³ Many of these are referred to in chapter 3.

⁴ [1902] A.C. 484.

⁵ At p. 505.

broke out. Mathew J., 'under the system of pleading (or in the absence of it) then prevailing',¹ actually allowed the case to be tried under an agreement 'that no dilatory plea should be set up, based upon the fact that the plaintiff company was alien (*sic*), and could not sue while the war lasted. The case, it was agreed, should be dealt with as if the war were over.'² This course was questioned by Lord Davey when the case came to the House of Lords,³ but, as the war was then at an end, it was allowed to pass. It is inconceivable that a Court should now, after the clearer definition and accentuation of the plea in the War of 1914 to 1918, permit such a course.

This brief survey of the history of the plea of alien enemy brings us to modern times, and the modern law has already been stated in chapter 3. Much of the history has been rendered less important by the decisions of the Court of Appeal in *Porter v. Freudenberg*⁴ in 1915 and of the House of Lords (though regrettably divided upon the legal nature of the plea and its application to the special circumstances) in *Rodriguez v. Speyer Brothers*⁵ in 1918. Valuable summaries of the history will be found in the judgments of Lord Reading C.J. in the former case and of Lord Sumner in the latter.

¹ To quote Lord Sumner's caustic stricture, [1919] A.C. at p. 111.

² [1900] 2 Q.B. 339, 343.

³ [1902] A.C. at p. 499.

⁴ [1915] 1 K.B. 857.

⁵ [1919] A.C. 59. See comments upon this decision in the *Sovfracht* case [1943] A.C. 203.

APPENDIX II

LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943

An Act to amend the law relating to frustration of contracts. [5th August 1943]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

2. (1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to contracts as respects which the time of discharge is before the said date.

(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

(3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.

(4) Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge,

or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.

(5) This Act shall not apply

- (a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or
- (b) to any contract of insurance, save as is provided by subsection (5) of the foregoing section; or
- (c) to any contract to which section seven of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

3. (1) This Act may be cited as the Law Reform (Frustrated Contracts) Act, 1943.

(2) In this Act the expression 'court' means, in relation to any matter, the court or arbitrator by or before whom the matter falls to be determined.

APPENDIX III

THE LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943¹

(Reprinted from *The Law Quarterly Review*, 1944)

For some years past it has been recognized that the rule in *Chandler v. Webster* produced unsatisfactory consequences which required attention. In May, 1937, the Lord Chancellor, Lord Maugham, referred to the Law Revision Committee the following question:

'Whether, and, if so, in what respect the rule laid down or applied in *Chandler v. Webster* [1904] 1 K.B. 493 requires modification, and in particular to consider the observations made thereon in *Cantiare San Rocco, S. A. v. Clyde Shipbuilding and Engineering Co. Ltd.* [1924] A.C. 226 by Lords Dunedin and Shaw at pp. 247, 248 and 259.'

That Committee's reply² to the question was as follows:

'We therefore recommend that, when performance of a contract has been frustrated in whole or in part and any money has been paid, or has been agreed to be paid, at a time prior to the frustration of the contract, the following rules shall apply unless a contrary intention appears from the terms of the contract:

(1) Money paid by the one party to the other in pursuance of the contract shall be recoverable, but subject to a deduction of such sum as represents a fair allowance for expenditure incurred by the payee in the performance of or for the purpose of performing the contract. In fixing the amount of such deduction the Court shall include an allowance for overhead expenses but shall also take into account any benefits accruing to the payee by reason of such expenditure, and the amount recovered shall not exceed the total of any money so paid or agreed to be paid under the contract. Loss of profit shall in no case be taken into consideration.

(2) When at the moment of frustration the contract has been performed in part and the part so performed is severable, these rules shall apply only to that part of the contract which remains unperformed, and shall not affect or vary the price or other pecuniary consideration paid or payable in respect of that part of the contract which has been so performed.

¹ See Glanville Williams, *Law Reform (Frustrated Contracts) Act, 1943: Text and Commentary* (1944), and Falconbridge in *Canadian Bar Review*, vol. XXIII (1945), p. 469.

² Seventh Interim Report: Cmd. 6009 of 1939. Reference should also be made to the Report of the Committee on Liability for War Damage to the subject-matter of contracts: Cmd. 6100 of 1939.

(3) For the purpose of these recommendations no regard shall be had to amounts receivable under any contracts of insurance.

We do not recommend any alteration in the law relating to freight *pro rata itineris*, since the rule relating thereto, although frequently criticized, has become so firmly fixed that it would be undesirable to alter it. For the same reason we do not recommend any alteration in the law relating to advance freight except in the case of hire paid in advance under a time charter which, as explained in Appendix B, we think should be recoverable in the event of frustration of the adventure in the same manner and to the same extent as other payments in advance made under a contract.'

Appendix B to the Report consisted of a note upon Advance Freight and Freight Payable *pro rata itineris*; and two members of the Committee, Lord Justice Goddard and the late Mr W. E. Mortimer, a solicitor of great experience, added the following note to the Report:

'We have signed the Report because we think that the suggested alterations in the rule in *Chandler v. Webster* would make the law fairer than it is at present. The Report contains no recommendation regarding the converse case where the promisee has paid nothing; in this case it appears the loss is still to "lie where it falls". Presumably owing to the limited terms of reference it is not in the Committee's power to deal with either this question or the other questions which arise on frustration.'

The Report received consideration in the proper quarters, but no legislative action had been taken when in 1942 the House of Lords overruled *Chandler v. Webster* by their decision in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*,¹ which allowed a purchaser, party to a contract which became frustrated, to recover from the vendor a prepayment upon the ground of a failure of consideration. The justness of the effect of the decision was universally admitted, though there were some who questioned the wisdom of overruling a decision of the Court of Appeal which had formed part of our law for more than forty years, and would have preferred the method of legislation.

It was at once recognized that legislation had now become necessary in order to permit a wider adjustment of the rights and liabilities of all the parties to a frustrated contract, and the present Lord Chancellor introduced a Bill which received the Royal Assent on August 5, 1943, under the title of the Law Reform (Frustrated Contracts) Act, 1943. It

¹ [1943] A.C. 32.

is not proposed to discuss here the doctrine of frustration or the principles underlying the *Fibrosa* decision or its commercial and other consequences, but merely to make a few comments upon some of the provisions of this useful and necessary statute. The main point to note is that it is adjectival rather than substantive. It does not define the nature or the scope of frustration but regulates its consequences, once it has happened.

I. Subsection (1) of section 1 is as follows:

'Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.'

The expression '*a contract governed by English law*' calls for comment.

'The operation of a statute *prima facie* extends to the whole of the United Kingdom, and not to any place outside it.'¹

This Act contains no territorial definition of its scope and therefore *prima facie* extends to the whole of the United Kingdom, but only *prima facie*. The expression '*a contract governed by English law*' is an ingenious and, so far as we are aware, novel device for defining the scope of operation of the statute, not in territorial language but so as to make its operation coincident with the scope of English law; though, of course, the statutory obligation is confined to the United Kingdom.

Thus:

(a) It binds all Courts in England and Wales, Scotland and Northern Ireland, when they are dealing with '*a contract governed by English law*'; in these circumstances they *must* apply the provisions of the Act; for instance, a Scottish Court dealing with a contract governed by English law.

(b) It does not alter the law to be applied by Courts in England and Wales, Scotland and Northern Ireland when they are not dealing with '*a contract governed by English law*'; for instance, in the case of an English Court dealing with a contract governed by Scots law.

(c) For obvious reasons, the Act does not bind an American or a Canadian Court, but either of these Courts *ought* to apply the provisions of the Act to a contract which, according to the rules relating to the conflict of laws accepted by that country, is '*governed by English law*'.

¹ Halsbury (*Hailsham*), *Laws of England*, vol. 31, § 674.

There can be no doubt that the expression 'a contract governed by English law' means 'a contract of which the proper law is English law'. Rule 155 in Dicey, *Conflict of Laws* (5th ed.) defines the term 'proper law of a contract' (as used in that book) as 'the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves'. Dicey's rule 160 provides that 'The material or essential validity of a contract is [subject to certain Exceptions] governed by the law of the contract', and his Rule 162 provides that 'The validity of the discharge of a contract...depends upon the proper law of the contract...'.¹

II. '*Has become impossible of performance or been otherwise frustrated.*' The Act does not define the word 'frustrated', but there can be little doubt that the expression quoted above comprises the following types of case:

(a) discharge of contract by reason of supervening physical impossibility, as illustrated by *Taylor v. Caldwell*;²

(b) discharge of contract which it would be unjust to enforce by reason of a change in vital circumstances, as in the Coronation Seat cases—frustration *stricto sensu*;

(c) discharge of contract by reason of supervening illegality.

Historically, types (a) and (b) are closely connected,² while type (c) is distinct; but that is no reason why the law should not deal in the same manner with the consequences of the discharge of all three types. The sense in which the word 'frustration' is used is now changing and widening and cannot yet be said to be uniform. The word has been used to denote the operation of the law in discharging a contract by reason of the occurrence of events or circumstances which, or the magnitude of which, could not have been within the contemplation of the parties when making it, and which are of such a character that to hold the parties to the contract would be to impose a new contract upon them; the legal device underlying this operation of the law being that of the implied term.³ The effect of supervening illegality is quite different; the ensuing discharge operates simply, directly and automatically, and there is no need to speculate upon the expectations of the parties or to resort to an implied term; a plain rule of law suffices.

¹ (1863) 3 B. & S. 826.

² See chapter 6 above.

³ *Ibid.*

This distinction between frustration and supervening illegality in the strict, historical, sense is recognized, for instance, by Viscount Simon L.C. in the *Fibrosa* case;¹ by Simonds J. in *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*,² where he held the contract to be discharged upon the outbreak of war by reason of illegality and so found it unnecessary to deal with the plea of frustration; and by the Court of Appeal³ in the latter case, which, while reversing Simonds J. on grounds not here relevant, dealt with supervening illegality and frustration as two separate points. Nevertheless, there is a growing tendency to include the effects of supervening illegality within the conception and terminology of frustration,⁴ and there can be little doubt that it is comprised within the expression quoted above from subsection (1) of section 1 of the new Act.

III. *Leases and tenancies.* It has been decided in a number of cases, of which one of the latest and most authoritative is *Leightons Investment Trust v. Cricklewood Property and Investment Trust*,⁵ that the doctrine of frustration does not apply to leases and tenancies of land or of houses, for these contracts are more than contracts; there can be no doubt that the Act does not apply to such contracts, at any rate when frustrated *stricto sensu*, that is, in the meaning assigned to that term before the Act. But in the event of the parties to a lease or a tenancy being discharged therefrom as a result of supervening illegality, is there any reason why the Act should not regulate the consequences?

IV. *What causes of impossibility or frustration does the Act contemplate?* The Act, very naturally, does not attempt to specify the multifarious circumstances which may cause a contract to 'become impossible of performance or...otherwise frustrated', but the following comments may be made:

(a) The Act is in no way confined to the effects of war and would be equally applicable to contracts, say, for seats booked for the purpose of viewing a victory parade of our returning troops at the end of the present war, or to time charterparties frustrated by a requisition.

¹ (1943) A.C. 32, 41: 'There is a further reason for saying that this subsidiary contention of the appellants must fail, namely...and, therefore, the contract could not be further performed because of supervening illegality', citing the *Ertel Bieber* case [1918] A.C. 260, which has usually been regarded as a straight case of supervening illegality.

² [1946] Ch. 13.

³ *Ibid.*; and see [1946] A.C. 219.

⁴ This is implicit throughout the speeches delivered in the House of Lords in the *Fibrosa* case.

⁵ [1943] K.B. 493 (C.A.); but the House of Lords was divided upon the point: [1945] A.C. 221.

(b) If we are right in our submission that supervening illegality is comprised within the expression 'has become impossible of performance or been otherwise frustrated', then supervening illegality automatically and instantaneously attracts the operation of the Act. Thus, if the outbreak of war produces supervening illegality, for instance, where one party is resident in England and the other is an enemy in the territorial sense by reason of being voluntarily resident or carrying on business in enemy territory, the outbreak of war can be said to produce automatic and instantaneous discharge. For this purpose, 'war' means war in the technical sense and not merely 'strained relations',¹ so that the existence of the kind of relations that prevailed, for instance, between Great Britain and Finland for some months before war was declared would not, *in itself* and without any prohibition having statutory authority, produce supervening illegality of this type.

(c) The enemy occupation² of British or neutral territory will usually have the same effect as the outbreak of war in rendering performance of the contract by a person resident in England illegal by reason of the fact that the other party is voluntarily resident or carrying on business in enemy-occupied territory or, without that, of the fact that performance involves intercourse with a person who has become enemy by reason of enemy occupation or with enemy-occupied territory, as in the *Fibrosa* case—Gdynia in enemy-occupied Poland.

(d) The outbreak of a war to which Great Britain is not a party does not in itself make it illegal for a British party to perform a contract, though, if its performance would be illegal for the other party being a subject of one of the belligerents, the contract would be discharged. As Willes J. said in *Esposito v. Bowden*,³ after pointing out that it was illegal for the British charterer of a neutral ship to load a cargo at Odessa after the outbreak of the Crimean War:

'This is not an unequal law, because, if war had broken out between the Czar and the King of the Two Sicilies, instead of Her Majesty, the vessel would, according to the principles stated above, have been absolved from going to Odessa, and might forthwith have proceeded upon another voyage.'

In short, a British party to a contract cannot compel the subject of a foreign belligerent to violate the law of the latter's State by trading

¹ *Janson v. Driefontein Consolidated Mines* [1902] A.C. 484, 497.

² *V/O Soufracht v. N.V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* [1943] A.C. 203, where the essentials of occupation for this purpose are explained.

³ (1857) 7 El. & Bl. at p. 791.

with the enemy of his State.¹ But inquiry must be made in order to ascertain whether it is illegal for the foreigner to have intercourse with his enemy, because in many foreign countries there is no 'common law' prohibition of intercourse with the enemy and it rests upon an express law or decree.

V. *The Principles and Limits of the Adjustment.* Subsection (2) of section 1 is as follows:

'All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.'

It will be noted that the Act not only in substance enacts the *Fibrosa* decision in this subsection (a somewhat unusual but quite justifiable proceeding which suggests that the subsection may have been *in gremio legis* before the *Fibrosa* decision brought it to birth), but by means of the proviso and the later subsections goes far beyond a mere reversal of the old rule that 'the loss lies where it falls', and states the principles which must guide the Court in the adjustment of the rights and liabilities of the parties to a contract falling within the scope of subsection (1). Although the later subsections must be considered together in order to obtain a complete picture, comment will be easier if they are taken separately. At the outset let us note that the statute does not give the Court *carte blanche* to make whatever adjustment seems to be just and equitable, that is, to act *ex aequo et bono*; it states certain principles and imposes certain limits.

The cause of action for the recovery of a prepayment is stated to be money received by the defendant for the use of the plaintiff, or, to use the old language,² 'the common indebitatus count for money received',

¹ It is submitted that this proposition thus limited is correct. As to wider implications, see *Furness, Withy & Co. v. Rederiaktiebolaget (sic) Banco* [1917] 2 K.B. 873.

² Bullen & Leake, *Precedents of Pleading*, 3rd ed. (1868), p. 44.

applicable, *inter alia*, for the recovery of money recoverable by reason of a total failure of consideration—the ground stated by the House of Lords in the *Fibrosa* decision. But, as the Lord Chancellor and other learned Lords pointed out in that case, that would only afford a true remedy in the case where the party due to repay the money had incurred no expense. Accordingly the proviso deals with the case where expenses have been incurred by equipping the party who by the terms of the contract was entitled to be paid certain sums before the frustrating event, with both a shield and a sword—a shield which enables him, if he has already been paid, to retain an allowance for expenses which he may have incurred (in certain circumstances about to be discussed) before making a repayment, or, as the case may be, a sword which enables him to recover the whole or part of any sum, as the Court may determine, which was payable to him in pursuance of the contract before the time of discharge but has not in fact been paid, limited in each case to the amount of his expenses. In fact, he is not entitled as of right to retain or recover the full amount of his expenses.

The circumstances giving rise to the right of retention, or, as the case may be, recovery, are that the expenses should have been incurred:

- (i) before the time of discharge, and
- either (ii) in the performance of the contract,
- or (iii) for the purpose of the performance of the contract.

An instance of (ii) is afforded by the case of a ship-repairer who has already completed part of the repairs before the ship is destroyed by fire,¹ or by the case of a manufacturer who has manufactured half of the goods agreed to be supplied and then finds them left on his hands.

An instance of (iii) is afforded by the case of the householder who, having undertaken to erect a stand in order to view a procession and to provide luncheon, has bought timber for the purpose of the stand and food for the luncheon. If a manufacturer has incurred expense in installing special machinery for the purpose of performing the contract, this expenditure would presumably rank even though he has not begun to manufacture the goods that are the subject-matter of the contract.

The amount of the expenses incurred is not the measure of the sum to be retained or recovered but is only one of the factors to be taken into account, together with all the circumstances of the case, in fixing the amount of the retention or recovery; the amount of his expenses incurred, however, provides the ceiling.

¹ To quote the instance given by Lord Atkin [1943] A.C. at p. 54: 'One party may have almost completed expensive work. He can get no compensation', i.e. before the Act.

VI. *Valuable benefit.* Subsection (3) is as follows:

'Where any party to the contract has, by reason of anything done by any other part thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.'

Thus I agree with you to build on your land a house for the sum of £2000, payable on completion. When I have done about three quarters of the work, all private building is stopped by a Defence Regulation. The house is a shell and not ready for you to live in, but, by spreading tarpaulin where the roof and the windows ought to be, you can preserve it until the prohibition is removed. This subsection gives me a kind of *quantum meruit* action against you to recover any sum not exceeding the value of your benefit as the Court may consider to be just, having regard to certain factors; for instance, you might, in pursuance of the contract, have supplied part of the materials used or have paid me £500 on account; the circumstances giving rise to the prohibition may throw some light on the period of time likely to elapse before you will be able to complete the house and occupy it.

It must be noted that this subsection, the inspiration of which is no doubt Lord Wright's valuable exposition of unjust enrichment in the *Fibrosa* decision,¹ is independent of subsection (2) and applies whether or not a payment had to be made before performance of the contract. The benefited party may have to pay both under subsection (2) and under subsection (3); for instance, under a shipbuilding contract which vests property in the purchaser as the work proceeds, the purchaser may have to pay under subsection (2) up to the amount of the expenses incurred by the shipbuilder and may also have to pay under subsection (3) up to the value of the benefit received, less the amount paid under subsection (2) if it is less than the value of the benefit. If building costs

¹ [1943] A.C. at pp. 61-73. See also his *Legal Essays and Addresses*, pp. 1-65.

have increased since the contract was placed, the effect would be to deprive the purchaser of the advantage of his contract.

VII. *Overhead expenses and personal labour.* Subsection (4) is as follows:

‘In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.’

It is right that in calculating expenses a party should be allowed to include a portion of his overhead expenses, such as a portion of the rent of his premises, of the salaries of his managerial staff and other office expenses, and also a sum representing the value of his own skill and labour, if any, involved ‘in, or for the purpose of, the performance of the contract’. It will be noted that the amount of any expenses is relevant both when no question of benefit arises (subsection (2), proviso) and also in the case of a benefit (subsection (3)). One of the recommendations of the Law Revision Committee (already quoted) was that ‘Loss of profit shall in no case be taken into consideration’. The Act contains no express reference to loss of profit, but that would appear to be one of ‘the circumstances of the case’ to which the Court is directed by subsections (2) and (3) to have regard.

VIII. *Insurance.* Subsection (5) is as follows:

‘In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.’

The principle underlying this section is that if a party voluntarily insures himself against loss resulting from the circumstances giving rise to the frustration, that is his own affair and is irrelevant in making an adjustment between the parties, just as it would be irrelevant to an action for damages for negligence brought against a carrier for the carrier to reply that the plaintiff has insured against the loss; the Court will ignore the fact, though the plaintiff’s insurers will not, and, if they have paid the loss, will be subrogated to his rights against the other party. If the insurance is not voluntary but is required either by an

express term of the contract or by any enactment, it is relevant and will not be ignored; and it is right that the fact of the loss being recoverable from the insurers should be taken into account, for the contract was made on the basis that an insurance would be effected, whether the obligation results from the contract itself or from an enactment, and the cost of insurance is presumably reflected in the price.

As an illustration of the words 'under any enactment', we may refer to compulsory insurance under the War Damage Acts; if the insurance is compulsory, the amount recoverable from the Board of Trade would be taken into account; *aliter* if the insurance is voluntary.

IX. *Benefit to third party.* Subsection (6) is as follows:

'Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.'

Before the outbreak of war I undertook to accept your son as a farm pupil for a period of three years and instruct him in the business of dairy-farming, in consideration of the payment by you to me of £300 on the completion of the instruction. After two years he is called up under a National Service (Armed Forces) Act. He has already learned a good deal. I am entitled to recover from you under subsection (3) such sum as the Court may consider to be just, having regard to the value of the training. If the sum of £300 had been paid to me in advance, you would (unless the contract is severable under subsection (4) of section 2) have a claim to repayment under subsection (2) of section 1, subject to my claim to retain up to the amount of any expenses incurred by me.

Quaere in either case. Must the Court have regard to any expenses incurred *by your son* in or for the purpose of the performance of the contract, whether he was a party to the contract or not?

Again, I agree with you to build a house for your daughter upon land belonging to her for the sum of £2000 payable on completion. When I have completed about three quarters of the work, all private building is stopped by a Defence Regulation. Your daughter has received a benefit, and I can recover from you under subsection (3) such sum as the Court considers just, not exceeding the value of the benefit received by your daughter.

X. *Retrospective operation.* Subsection (1) of section 2 is as follows:

‘This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to contracts as respects which the time of discharge is before the said date.’

The Act, which came into force on August 5, 1943, has only a very limited retrospective application, namely, where the time of discharge, as defined in subsections (1) and (2) of section 1, falls on or after July 1, 1943. The bill was ordered to be printed on June 22, 1943, and apparently July 1, 1943, is deemed to be the date on which the bill could reasonably be considered to have become matter of public knowledge. Thus it is the time of discharge, not the time of formation, that is material, and, no matter how long ago the contract came into existence, the Act applies if the time of discharge was on or after July 1, 1943. There may not be many pre-war contracts to which this Act will apply, but in terms it excludes *e limine* from its operation (*inter alia*) all contracts which became frustrated upon the outbreak of war with Germany or with any other enemy in the present war.

(a) When the cause of the discharge is supervening illegality arising directly and automatically from the outbreak of war, e.g. because one party is an enemy in the territorial sense or because performance involves intercourse with such a person, then the Act cannot apply to any contract which can now be called ‘a pre-war contract’.

(b) But, if the cause of discharge is some other species of frustration, then it is necessary to ascertain the date at which the cause operated to discharge the contract. Thus, a contract made last year, say, for the training of a horse for a particular race in 1944, or for the delivery of a horse at a particular place by rail in 1944, might be frustrated this year by a statutory prohibition of horse-racing or of the conveyance of horses by rail. The Act is not a war-time statute and governs the consequences of the frustration of a contract, however long ago it may have been made.

(c) Moreover, while war giving rise to illegality means war in the technical sense and not merely ‘strained relations’,¹ there are certain conditions of hostility, not, or not yet, amounting to war, which can frustrate the performance of a contract, and in these cases it will be necessary to ascertain the precise date at which these conditions operate to discharge the contract by frustrating its performance.

¹ *Janson v. Driefontein Consolidated Mines, supra.*

XI. *The Crown.* Subsection (2) of section 2 applies the Act 'to contracts to which the Crown is a party in like manner as to contracts between subjects'. Without this provision the Act would not bind the Crown, and it is unnecessary to speculate what the position of the other party would be in that event.

XII. *Express provision.* Subsection (3) of section 2 is as follows:

'Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.'

This subsection makes provision, *inter alia*, for the occurrence in commercial contracts of a clause intended to deal with the consequences of frustration and is designed to subordinate the provisions of section 1 of the Act to the expressed intentions of the parties. This follows logically from the view, now believed to be generally accepted, that the doctrine of frustration rests upon an implied term and that the Court is seeking to give effect to the intentions of the parties, though, as has already been pointed out, the effect of supervening illegality as a cause of frustration does not rest on an implied term.

It must, however, be noted that in a number of decisions it has been held that in spite of the expressed intention of the parties to provide for an event likely, apart from that expressed intention of the parties, to produce frustration, the event may be of so fundamental a character as to produce frustration, whatever the clause may purport to do. Thus in *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*¹ the fact that a time charter contained the usual clause exempting the parties from liability for non-performance in the event of 'arrests and restraints of princes, rulers and peoples' did not prevent a requisition by the Admiralty, followed by structural alterations having the effect of converting a tanker into a troop-ship, from effecting a frustration of the contract. Lord Haldane said:

'Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence of itself may

¹ [1916] 2 A.C. 397, 406; see also *Jackson v. Union Marine Insurance Co.* (1873) L.R. 8 C.P. 572; (1874) 10 C.P. 125; and *W. J. Tatem Ltd. v. Gamboa* [1939] 1 K.B. 132. Presumably a provision in a contract which purported to evade the Trading with the Enemy legislation would not receive effect.

yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.'

It is believed that subsection (3) of section 2 is not intended to alter this rule or to prevent the operation of what may be termed overriding frustration—a frustration of so fundamental a character that it sweeps away the modest attempt of the parties to provide for dislocating events. It is suggested rather that the effect of this subsection is to give effect to any stipulations that the parties may have made for dealing with the *consequences* of frustration, e.g. as to payment or repayment of money, reimbursement of expenses, etc. In other words, the Act does not deal with the substance of frustration—what causes frustration and what does not—but with the tidying up of the mess which frustration produces. If the parties have themselves made their consequential arrangements, why not give effect to them?

XIII. *Severance*. Subsection (4) of section 2 (severance of a wholly performed part of contract from the remainder) in substance follows a recommendation of the Law Revision Committee quoted above.

'*can properly be severed.*' The Act affords no guidance upon the tests of severance. Sometimes the contract expressly provides for severance, e.g. in a contract for sale of goods over a period of time, 'each delivery to be a separate contract'. In such a case the Court would no doubt give effect to the provision. But where the contract itself is silent, difficult questions may arise, e.g. a time charterparty for twelve months, hire being payable monthly. If it is frustrated after the completion of the first six months, are the first six months to be treated as a separate contract? Or, again, consider a contract of apprenticeship for three years frustrated by the pupil being called up under the National Service (Armed Forces) Acts after two years. Must an adjustment of payments and expenses and benefits be made, or are the first two years treated as a separate contract?

XIV. *Charterparties*. Subsection (5) of section 2 contains the following provision:

'This Act shall not apply (a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea.'

The reason for this provision will become apparent upon reference to the final paragraph of the Seventh Interim Report of the Law Revision Committee quoted above,¹ and to Appendix B to that Report, con-

¹ At p. 414.

taining notes on the well-established rules governing 'Advance Freight' and 'Freight payable *pro rata itineris*'—rules which are applicable to voyage charterparties and not to time charterparties or to charterparties by way of demise. These two principles—the irrecoverability of advance freight paid under a voyage charterparty even though the ship and cargo are lost, and the rule that freight (other than advance freight) payable under a voyage charterparty is not recoverable unless the contract of carriage is completely performed—are so firmly established in the business practice of shipowners and insurers that an interference with them would be undesirable. There are no similarly accepted rules applicable to time charterparties (though in practice most of them provide that all hire paid in advance and not earned shall be refunded) and there is no reason why the consequences of their frustration should not be regulated in the same way as the consequences of the frustration of contracts in general. On the other hand, a bill of lading is clearly more akin to a voyage charterparty than it is to a time charterparty, and the Act treats it in the same way as a voyage charterparty. We are not aware of an instance of the frustration of the contract contained in a bill of lading, using the term 'frustration' *stricto sensu*, but many bills of lading are frustrated by supervening illegality upon the outbreak of war.

We must confess that the provision quoted above gives us some difficulty. That it preserves the old-established law as to advance freight and freight payable *pro rata itineris* is clear. But has it, in doing this, done something more? Lord Sumner said in *Bank Line v. Arthur Capel & Co.*:¹ 'the principle of frustration was originally decided on a voyage charter', doubtless referring to cases like *Geipel v. Smith*² and *Jackson v. Union Marine Insurance Co.*,³ and it was so applied in a number of cases decided during and after the War of 1914 to 1918. A charter for a single voyage lends itself more easily to the notion of an 'adventure' than a charter for a period of time, and it was with some difficulty that the doctrine was applied, as it eventually was, to time charters, for instance, in the *Bank Line* case already referred to, in *Hirji Mulji v. Cheong Yue Steamship Co.*,⁴ and in *W. J. Tatem Ltd. v. Gamboa*.⁵

Subsection (5) (a) of section 2 does not say that the doctrine of frustration can no longer apply to a voyage charter, but it means that,

¹ [1919] A.C. 435, 452.

² (1872) L.R. 7 Q.B. 404.

³ (1873) L.R. 8 C.P. 572; (1874) L.R. 10 C.P. 125, 141 (see below, p. 429, as to this case).

⁴ [1926] A.C. 497.

⁵ [1939] 1 K.B. 132.

if a voyage charter becomes impossible of performance or is otherwise frustrated and the parties thereto are for that reason discharged, the consequences of that discharge are such as the common law provides and not—or not necessarily—those which this Act attaches to the discharge of certain other contracts for the same reason.

XV. *Contracts of insurance.* Subsection (s) of section 2 also contains the following provision:

‘(s) This Act shall not apply (b) to any contract of insurance, save as is provided by subsection (s) of the foregoing section’ [which has been quoted above].

It would seem that the effect of this provision is to prevent the assured from claiming a *pro rata* return of premium if, for instance, the contract of insurance is discharged by supervening illegality, or if the property insured is destroyed during the currency of the policy by events other than those insured against. Apart from that, it is difficult to see how a contract of insurance could be discharged by reason of impossibility of performance or other species of frustration, and we are not aware of any instance in which this has happened; insurance involves the payment of money, and, as Pollock has quoted from Savigny:¹ ‘there is plenty money in the world and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay’. Nevertheless, when we are told that the Act does not ‘apply to any contract of insurance’, we must remember cases such as *Jackson v. Union Marine Insurance Co.*,² where an action was brought by a shipowner upon a policy of insurance on freight due under a voyage charterparty; the Exchequer Chamber held—in substance though not in so many words—that the charterparty had been frustrated by the operation of perils of the sea, since, in the words of the finding of the jury, ‘the time necessary to get the ship off and (*sic*) repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers’; therefore the shipowner could not have sustained an action against the charterer for not loading and therefore there had been a loss of chartered freight upon the policy of insurance. We apprehend that the Act is not intended to, and does not, alter the law laid down in this case; in such cases a voyage charterparty may be frustrated and give rise to a claim upon a policy on freight, but no question arises of the frustration of the contract of insurance.

¹ *Principles of Contract*, 11th ed., p. 236.

² *Supra*.

XVI. *Sale of goods.* Subsection (5) of section 2 also contains the following provision:

‘(5) This Act shall not apply (c) to any contract to which section seven of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.’

The ground for the express exclusion of these contracts, an exclusion which may well be provided *ex abundanti cautela*, would appear to be that the consequences of their frustration are adequately taken care of by the existing law. The exclusion was probably suggested by Viscount Simon's discussion of *Ruegg v. Minetti*¹ in his *Fibrosa*² speech. Paragraph (c) appears to cover the following, amongst other, cases:

(i) Agreement to buy a horse for £50 paid down, but the horse is not to be delivered for a month and meanwhile remains at the risk of the seller; during the month and before delivery it dies, without the fault of either party. Section 7 of the Sale of Goods Act applies; the contract is avoided; there is a total failure of consideration, and the purchaser can recover the sum of £50; the Act of 1943 does not apply, and the seller cannot retain the interim cost of feeding the horse.

(ii) Same facts, except that the seller had undertaken to shoe the horse before delivery, the horse meanwhile remaining at his risk, and the horse dies before delivery. Section 7 of the Sale of Goods Act again applies; the purchaser can recover the sum of £50;³ the Act of 1943 does not apply and the seller cannot retain the cost of shoeing the horse if he has shod it.

(iii) Same facts as in (i) or (ii), except that it is provided that the horse is the property of, and at the risk of, the purchaser as from the date of the contract. Section 7 of the Sale of Goods Act does not apply because the risk has passed. The contract is frustrated upon the death of the horse, and the seller is discharged from his obligation to deliver, but the purchaser cannot recover the sum of £50 because the horse was at his risk. The Act of 1943 does not apply.

But the paragraph does not apply to a contract for sale, or sale and delivery, where the goods are specific and frustration arises not from the perishing of the goods, but from any other cause, e.g. a prohibition against delivery of cattle by reason of an outbreak of foot and mouth disease or against export by reason of the outbreak of war, nor to an

¹ (1899) 11 East 110.

² [1943] A.C. at pp. 48, 49.

³ Viscount Simon L.C. [1943] A.C. at p. 49.

agreement for the sale of unascertained goods;¹ in these cases the Act of 1943 will apply.

XVII. *Arbitration.* Subsection (2) of section 3 provides that the expression 'court' means 'the court or arbitrator by or before whom the matter falls to be determined'.

In connexion with arbitration under a frustrated contract it is necessary to bear in mind Lord Sumner's rather wide statement, in delivering the opinion of the Privy Council in *Hirji Mulji v. Cheong Yue Steamship Co.*,² as to the effect of frustration upon a contract containing an arbitration clause in bringing that clause 'to an end, too'—a statement which was questioned by the House of Lords in *Heyman v. Darwins*.³

XVIII. *The degree of finality in the discretion of the Court.* The intended effect of section 1 is to enable the Court to adjust the rights and liabilities of the parties to the contract and to do justice between them. Note the repeated use of such expressions as 'if it considers it just to do so', 'as the Court considers just', 'such sum as appears to be reasonable', and 'if in all the circumstances of the case it considers it just to do'. It is therefore worth looking at the attitude adopted by the Courts, and, in particular, by appellate Courts, to the exercise of this kind of discretion in other cases. It will suffice to refer to three statutes—the Maritime Conventions Act, 1911, the Law Reform (Married Women and Tortfeasors) Act, 1935, and the Partnership Act, 1890. With regard to the first, section 1 of which provides that 'the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault', the Court of Appeal in *The Testbank*⁴ held that the apportionment by the trial judge of the degrees of blame and the damages between the parties was an adjudication on a question of fact and as much liable to review and modification by a higher tribunal as an adjudication upon any other question of fact; they declined to follow certain contrary *dicta* uttered in the Court of Appeal in *The Karamea*.⁵ But in *British Fame v. MacGregor*⁶ the opinion expressed in *The Testbank* was strongly dissented from by the House of Lords, approving Lord Wright in *The Umtali*.⁷ Viscount Simon L.C. said that 'when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an

¹ For cases in which the doctrine of frustration has been applied to agreements for the sale of unascertained goods, see above, pp. 304-310.

² [1926] A.C. 497, 505.

³ [1942] A.C. 356.

⁴ [1942] P. 75.

⁵ [1921] P. 76.

⁶ [1943] A.C. 197, at 199, 201.

⁷ [1938] 160 L.T. 114.

appellate tribunal will undertake to revise the distribution of blame will be rare', and Lord Wright repeated that 'it would require a very strong case to justify any such review or interference with this matter of apportionment where the same view is taken of the law and the facts'.

Upon the second statute referred to above, which in section 6 (2) contains the expression 'such [contribution] as may be found by the Court to be just and equitable', the decision of the Court of Appeal in *Croston v. Vaughan*¹ shows that that Court would be [in the words of Slessor L.J.] 'very loath to disturb the proportion of contributions as between the tortfeasors which has been assessed by the learned judge, and, bearing in mind the cases which have arisen in Admiralty law as regards both the earlier question of contribution, when the contributions were equal, and the present provisions under the Maritime Conventions Act, 1911, the matter would normally be one entirely for the discretion of the judge, with which this Court would not interfere'. Later, in *Ingram v. United Automobile Services Ltd.*,² the Court of Appeal expressly applied *British Fame v. MacGregor* to the Law Reform (Married Women and Tortfeasors) Act, 1935.

A third case of apportionment by the Court occurs under section 40 of the Partnership Act, 1890, which empowers the Court, upon the dissolution of a partnership in certain circumstances, to order the repayment of a premium paid by one partner upon entering the partnership 'or of such part thereof as it thinks just, having regard to' certain facts. The Court of Appeal held in *Lyon v. Tweddell*,³ in the case of an exercise of this power, that it 'ought not to interfere with [the Vice-Chancellor's] discretion except upon very sufficient grounds'.

The language used in the 1943 Act under discussion is discretionary in the extreme, and there can be no doubt that an appellate Court would only in exceptional cases interfere with the decision of a trial judge in making the adjustment which seemed to him to be required.

ARNOLD D. MCNAIR

¹ [1938] 1 K.B. 540, 554.

³ (1881) 17 Ch. D. 529, 531.

² [1943] K.B. 612.

APPENDIX IV

THE REQUISITIONING OF MERCHANT SHIPS¹

(Reprinted from The Journal of Comparative Legislation, 1945)

The object of this paper is to examine certain questions which arise in the domain of Conflict of Laws as to the status of merchant ships and, in particular, as to their *situs*. The presence of so many distinguished foreign lawyers at this Conference affords a valuable opportunity of discussing this topic from a comparative point of view—a point of view which is nowhere more desirable than in questions of Conflict of Laws.

I am not concerned with the inter-State questions to which merchant ships give rise, such as the criminal jurisdiction of States over foreign merchant ships in their ports or territorial waters,² for they belong to the domain of Public International Law. Nor am I concerned with such matters as births, marriages or torts occurring, or contracts made, on board merchant ships, though these matters, while mainly governed by the law of the flag State, not infrequently give rise to, or form an element in, questions of Conflict of Laws. I wish to consider primarily the question what, in the case of a merchant ship, is the respective importance of the law of the flag and of the *lex situs*, with particular reference to the power or right of requisitioning ships—a practice which has developed rapidly during recent years and is likely to continue for some time—and what *situs* must be assigned to a merchant ship.

The question of *situs* may become relevant for the following purposes:

- (i) to determine the validity of (a) a voluntary, or (b) an involuntary, transfer of the ownership or possession of the ship;
- (ii) as to (a), to determine the validity of a sale of mortgage or testamentary disposition;
- (iii) as to (b), to determine the validity and effect of a judgment *in rem*, or some non-judicial act by a Government, affecting a ship.

¹ Being a paper read at the Annual Conference of the Grotius Society in London on June 2, 1945.

² See a valuable article by Charteris in *British Year Book of International Law*, vol. i, pp. 45-96.

The English rules relating to the transfer of tangible movables cannot be regarded as completely settled. Dicey¹ states them to be as follows:

'Rule 152. A transfer of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the transfer (*lex situs*), wherever such transfer is made, is valid.'

(Rule 153 relates to intangible movables, e.g. a debt.)

'Rule 154. (1) Subject to the Exception hereinafter mentioned, and to the very wide effect of Rules 152 and 153, the transfer or assignment of a movable, wherever situate, in accordance with the law of the owner's domicil (*lex domicilii*), or of the place where such transfer or assignment is made (*lex actus*), may be presumed to be valid.'

(2) (Relates to intangible movables.)

'Exception. When the law of the country where a movable is situate (*lex situs*) (1) prescribes a special form of, or (2) imposes conditions of validity of, transfer or assignment, a transfer or an assignment according to the law of the owner's domicil (*lex domicilii*), or of the place where the transfer or assignment is made (*lex actus*), is, if the special form be not followed or the conditions be not fulfilled, invalid as a transfer or assignment, but it may be valid as a contract to transfer or assign.'

Rule 151, which I shall not quote, relates to personal capacity.

Westlake² likewise attributes the predominant influence to the *lex situs*. Cheshire³ would place serious limitations upon the relevance of the *lex situs*. I shall not pursue the general controversy, because my primary object is to endeavour to ascertain what are the rules governing one particular class of movables, namely, merchant ships, and one particular kind of act affecting them, namely, requisition, and what are the parts played by the *lex situs* and the law of the flag respectively.

I shall not discuss voluntary transfers.

An involuntary transfer may come about in a variety of ways:

(i) by means of a judgment *in rem* of a Court within whose jurisdiction the ship is at the relevant time;

(ii) by means of some non-judicial act of the Government within whose jurisdiction the ship is at the relevant time;

(iii) which must be put in the form of a question—to what extent can the flag State validly effect the requisition⁴ of one of its merchant

¹ *Conflict of Laws*, 5th ed. (Berriedale Keith), cited as 'Dicey'.

² *Private International Law* (7th ed.) (Bentwich), ch. vii; cited as 'Westlake'.

³ *Private International Law* (2nd ed.), pp. 423-439.

⁴ *The nature of the rights acquired by a State in ships requisitioned by it*. It is believed that the argument and the conclusions submitted in this paper are independent of the precise nature of the rights which a valid requisition vests in a State (or, as

ships (a) when on the high seas or (b) when within the territorial or the national waters of a foreign State?

(i) *The judgment in rem*¹ of a Court within whose jurisdiction the ship is, or which for other reasons is a Court of competent jurisdiction.

A judgment *in rem* of any Court within whose jurisdiction a ship is or which for other reasons is a Court of competent jurisdiction, is regarded by the law of England and by the law of many, if not most, other countries, as valid throughout the world. For this proposition we may cite statements contained in the judgments in *The Segredo*² and in *Simpson v. Fogo*,³ and, more directly, in *Castrique v. Imrie*⁴ in the House of Lords, and the passage from Story cited by Dicey⁵ and approved by the House of Lords in that case.

Such a judgment may take the form of

(a) a condemnation by a court of prize:

In *The Odessa*⁶ Lord Mersey, in delivering the Opinion of the Privy Council, said:

'The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the Sovereign or to his grantees....As the right to seize is

we must sometimes say, as in the case of the Spanish Civil War, in a Government). Their nature must be governed by the terms of the decree under which the requisition is effected, but the term 'requisition' usually denotes a temporary possession or control rather than a confiscation of property and a vesting of it in the State. In *The Broadmayne* [1916] P. 64, it was recognized by the C.A. that the ship requisitioned remained the property of the owners. Pickford L.J. said at p. 73: 'There is no particular magic in the word (requisition) itself; it does not connote the same state of things in every particular case'. And in *The Sarpen*, *ibid.* p. 306, the C.A. held that the requisition of that ship did not make her a ship 'belonging to His Majesty' within the meaning of section 557 of the Merchant Shipping Act, 1894, and as such debarred from making a claim for salvage services; and see Pickford L.J. at p. 317. In *The Cristina* [1938] A.C. 485, 502, Lord Wright said that 'The word "requisition", while not a term of art, is familiar and has been constantly used to describe the compulsory taking by Government, invariably or at least generally, for public purposes of the user, direction and control of the ship with or without possession'. See also the following: *Nicolaou v. Ministry of War Transport*, 77 Ll. L. Rep. 495; *Annual Digest and Reports of Public International Law Cases* (cited as *Annual Digest*), 1923-1924, Case No. 226, and also the discussion of the meaning of requisition in *The Laurent Meeus*, *Annual Digest*, 1941-1942, Case No. 35.

¹ Which Dicey (p. 272) defines as 'a judgment whereby a Court adjudicates upon the title to, or the right to the possession of, property within the control of the Court'.

² (1853) 1 Spinks Ecc. and Adm. 36, at p. 57.

³ (1863) 1 H. & M. 195.

⁴ (1860) 8 C.B. (N.S.) 1; *ibid.* 405; (1870) L.R. 4 H.L. 414.

⁵ At pp. 418 and 484.

⁶ [1916] 1 A.C. 145, 153; *Hughes v. Cornelius* (1680) 2 Show. K.B. 232; and see Hyde, *International Law*, ii, § 903.

universally recognized, so also is the title which the judgment of the Prize Court creates. The judgment is of international force.'

(b) a judgment upon a claim to establish ownership:

(c) a judgment vesting possession of the ship in an administrator appointed by the Court:¹

(d) a decree that a ship shall be sold in satisfaction of some lien or privilege or other right recognized by the Court possessing jurisdiction as inhering in the ship itself; for instance, a liability for the cost of repairs:²

(e) a decree that the ship shall be sold to satisfy an award of damages for collision or of salvage:³

(f) a decree of forfeiture for a breach of the revenue laws or other legislation binding the local Court:⁴

(g) an adjudication in bankruptcy or other insolvency proceedings.⁵

The principle 'that a judgment *in rem* is binding everywhere' was stated by Blackburn J. in *Castrique v. Imrie*⁶ to be 'in truth but a branch of that more general principle' that 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere'.

(ii) *Some non-judicial act of the Government of the State in whose jurisdiction the ship is at the relevant time.*

(a) *Angary*. The nature and limits of the right of angary are the subject of controversy,⁷ but there is no doubt that in time of war or other acute national emergency a State has power to requisition and use foreign merchant ships (and other means of transport) lying within its jurisdiction and belonging to the nationals of other States (or, in time of war, the nationals of neutral States), when urgently required for purposes of transport.⁸ Oppenheim suggests that the right extends to the high seas, but this statement is highly controversial. The exercise of the right of angary is subject to the payment of compensation.

¹ *The Jupiter* [1927] P. 122, 133.

² *Castrique v. Imrie*, *supra*; and see *Minna Craig Steamship Co. v. Chartered Bank of India* [1897] 1 Q.B. 55 and 460.

³ *The City of Mecca* (1881) 6 P.D. 106 (though in that case the foreign action was a personal one).

⁴ *Beak v. Thyrrwhit* (1688) 3 Mod. 194; *Lumly v. Quarry* (1702) 7 Mod. 9.

⁵ *The Segredo* (1853) 1 Spinks Ecc. and Ad. 36, 58.

⁶ (1870) L.R. H.L. 414, 429.

⁷ See Oppenheim, ii (6th ed.), §§ 364-367; Bullock in *British Year Book of International Law*, 1922-1923, pp. 99-129; Report of Admiralty Transport Arbitration Board, p. 17, the case of the Finnish ships (published by H.M. Stationery Office, 1927); *The Zamora* [1916] 2 A.C. 77.

⁸ See (British) Defence Regulation 53, quoted below.

Normally, it is believed, its exercise transfers possession but not ownership.¹ It is now the common practice for the British Prize Court to sanction the requisition by the Crown of enemy or neutral merchant ships in the custody of the marshal awaiting adjudication. Such a requisition transfers possession but not ownership. It is not a case of angary.

(b) *Other seizure by a foreign Government.* The right of angary exists only in time of war or other acute national emergency. If, however, a Government took possession of a foreign merchant ship lying within its waters and used it, it would be necessary, whatever the diplomatic remedy might be, for the Courts of the flag State or of any other State to respect that possession when avowed by the Government in possession and to defeat any attempt by the owner to recover possession by judicial means.²

REQUISITION

To what extent, if at all, can a State requisition merchant ships carrying its flag when they are outside its national or territorial waters? That is to say, in the requisitioning of merchant ships by the flag State, what, if any, is the relevance of their *situs*?

We shall (a) begin by attempting to examine the extent and nature of the power of requisition, as recognized by English constitutional law, and the peculiar legal position of a British ship, and (b) shall then examine such decisions as may help us to answer the questions posed above.

(a) *Extent and Nature of the Power to Requisition*

The late Sir William Holdsworth, in an article in the *Law Quarterly Review* of January, 1919, entitled 'The Power of the Crown to Requisition British Ships in a National Emergency', discussed in great detail both the spatial scope and the legal basis of this power. After an examination of a large number of writs, orders and commissions issuing with royal authority from the thirteenth century onwards and certain relevant statutes and decisions, he demonstrated a long course of practice whereby the Crown requisitioned for purposes of national emergency British merchant ships in British territorial waters, on the

¹ The nature of the right acquired by a belligerent State which requisitions neutral shipping is discussed in *Annual Digest*, 1923-1924, Case No. 226, where it was described by an American-German Claims Commission as a 'special or qualified property in the ships tantamount to absolute ownership thereof for the time being... an estate defeasible upon the happening of some event completely within his control': *American Journal of International Law*, xviii (1924), p. 628.

² *The Cristina* [1938] A.C. 485.

high seas and even in foreign ports.¹ In its origin the power owed something to feudal conceptions, namely, the duty of British ports to provide the King with ships in return for their franchises, but later the power came to be based rather on allegiance. He pointed out that this allegiance was not merely the shipowners' allegiance but the allegiance of the ships themselves, and stressed the significance of the expression 'Ships of the King's Ligeance' occurring in 5 Rich. II, c. 3, and 6 Rich. II, c. 8, as lying 'at the root of a good many of the later rules of law as to shipping'. The fact that in earlier times the Crown requisitioned both ships and the services of the masters and mariners points in the same direction. 'The width of these powers is accounted for by the fact that they were to a large extent based not on the locality of the ship, but upon the theory that shipowners and their ships owed allegiance to the Crown.' The judgment of the Admiralty Transport Arbitration Board, referred to above, refers to 'the view that requisition is based on allegiance'.

Our law distinguishes between the temporary and local allegiance owed to the Crown by the alien in this country² and the permanent and personal allegiance owed by British subjects wherever they may be. Moreover, the Crown by prerogative may at any time order its subjects, and British merchant ships, to return to this country. It would not be surprising if allegiance formed an element in the right of the Crown to requisition its subjects' property of any kind; at any rate from earliest times the Crown has had a peculiar interest in merchant ships carrying the British flag. For a long time they formed the only fleet on which the Crown could rely, and when at last a royal navy was established it was constantly and necessarily supplemented by merchant shipping either requisitioned or voluntarily placed at the disposal of the Crown. Section 1 of the Merchant Shipping Act, 1894, emphasizes the importance of ensuring that every owner of the whole or a part of a British ship shall beyond a doubt owe allegiance to the Crown.³

The expression 'Ships of the King's Ligeance' may be an archaic personification of the ship, but it embodies an early recognition of the peculiarly national character of merchant ships.

Private International Law draws the sharpest possible distinction between 'movables' and 'immovables', and in a physical sense a ship

¹ See the present (British) Defence Regulation 53, which empowers the Crown to 'requisition (a) any chattel in the United Kingdom (including any vessel or aircraft and anything on board a vessel or aircraft), and (b) any British ship or aircraft or anything on board a British ship or aircraft, wherever the ship or aircraft may be'. (A proviso excludes Dominion ships and aircraft.)

² See p. 33 above.

³ See section 18 of the repealed Merchant Shipping Act, 1854.

is one of the most 'movable' things imaginable. But in a legal sense it is tied to a particular territory and, as I shall submit, to the law governing that territory, in a peculiar fashion. The Merchant Shipping Act, 1894, s. 13, enacts that 'The port at which a British ship is registered for the time being shall be deemed the port of registry and the port to which she belongs', a provision which establishes the criterion of the right to fly the British flag and also constitutes a proof of title.¹ Transfers on sale, mortgage or otherwise and transmissions on death, marriage or bankruptcy must be recorded on the ship's register, and certain statutory documents must be employed.

The same suggestion of a peculiar element in the relation of a ship to the State to which it 'belongs', a vital interest of the State in its merchant ships, occurs in Beale's² discussion of the law of the flag. After stating (section 45. 1) that the law prevailing on American vessels is 'the law of their port of registry, which is the port nearest to the domicils of the majority of the owners', he points out the error of the old view that a merchant ship is a part of the territory of the State of registry and adds 'The correct explanation is that the law of the State of registry extends over the vessel because of the jurisdiction of the State over it as a portion of the property belonging in the State', and he cites a statement by Van Devanter J.³ in the United States Supreme Court to the effect that this jurisdiction 'partakes more of the characteristics of personal than of territorial sovereignty'.

It is relevant to quote here two statements from text-books:

Dicey:⁴

'A State's authority, in the eyes of other States and the Courts that represent them, is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (*unless they are its subjects*)⁵ not within its territory.'

¹ See also section 265 of the same Act (Conflict of Laws), which enacts that: 'Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then if there is in this Part of the Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision the case shall be governed by the law of the port at which the ship is registered.'

² *Conflict of Laws*, a high if not the highest American authority.

³ In *Cunard S.S. Co. v. Mellon* (1923) 262 U.S. 100, 123; *Annual Digest*, 1923-1924, Case No. 57.

⁴ At p. 20.

⁵ Italics mine. These are the words stressed by Atkinson J. in *Lorentzen v. Lydden & Co.* [1922] 2 K.B. 202.

Beale:¹

'While a State can exercise no legislative jurisdiction in the strict sense outside its own boundaries, it nevertheless has power to command its own citizens wherever they may be. As regards them it may issue commands for the regulation of their conduct while they are abroad. The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.'²

(b) *Decisions, British and Foreign*

Let us now look at some decisions, British and foreign, and see whether they throw any light on the relevance of the *situs* of a merchant ship as a condition of its susceptibility to requisition.

Holdsworth, in the article referred to above, quotes numerous writs and orders for the requisition of British merchant ships wherever they might be—at home or abroad. The practice was so common that it would be surprising to find it challenged. In *The Case of Ship-money* in 1637, examined at some length by Holdsworth, the legality of the power of requisition did not come directly into question and was acknowledged by both sides. The question of *situs* did not arise. In an Opinion given by two Admiralty judges in 1650 (printed by Holdsworth in the article referred to above), the right of the Crown to requisition certain British ships outside British waters and probably on the high seas was assumed without discussion.

*Furness, Withy & Co. v. Rederiaktiebolaget Banco*³ arose not upon a requisition but upon a law passed by the flag State. In 1916 a Swedish emergency decree made it illegal for Swedish ships of the kind in question to carry goods between two places outside the limits of that country. The Swedish shipowners invoked this decree (whether it was made before or after the date of the charter is not clear) as amounting to 'a restraint of princes', and so a ground for refusing to allow the ship to be used by the charterers outside Swedish limits. Upon it being objected that the decree could not operate as a 'restraint of princes' while the ship was outside Swedish jurisdiction, Bailhache J. held that 'where the law of a foreign State prohibits the performance of a contract, such as a charterparty, and renders the owners or master of the ship liable to fine or imprisonment if he disobeys that law, you have a case of restraint of princes provided the owner or master are (*sic*)

¹ *Conflict of Laws*, § 63. 1.

² Story J. in *The Apollon* (1924) 9 Wheat. 362, 370.

³ [1917] 2 K.B. 873.

subject to the jurisdiction of the foreign State either by being physically within its territory or by being subjects of that State'.

In *Russian Bank for Foreign Trade v. Excess Insurance Co.*,¹ where the Crown, armed with a Proclamation empowering it 'to requisition and take up for Our service any British ship or British vessel within the British Isles or the waters adjacent thereto', purported to requisition a British ship lying in a Russian port, Bailhache J. held the requisition to be *ultra vires* and void. It was clearly not within the terms of the Proclamation, but the Crown was not represented and the question whether such a requisition fell within the Royal prerogative does not appear to have been seriously argued. The decision was upheld on another ground, but in Holdsworth's opinion the judgment of Bailhache J. on the question of requisition was wrong.²

In *The Jupiter* (No. 3)³ one of the questions discussed was whether a Russian merchant ship had become the property of the U.S.S.R. by virtue of a decree of nationalization. Hill J. referring to 'the question whether the decrees transferred the property wherever situated', remarked that 'it was not suggested that ships were to be governed by any principles other than those applicable to other chattels'. (This is, it is submitted, highly controversial.) He continued: 'If the *Jupiter* was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognized in all the cases....' But as the learned judge held that the nationalization decrees did not purport to have extra-territorial operation and that the *Jupiter* was not within Soviet jurisdiction at the relevant time, the passage cited above was doubly *obiter*. The decision is useful for another reason, for Hill J., with the approval of the Court of Appeal, held that the decrees of French Courts vesting possession of the *Jupiter* in a French administrator and *made while she was lying in a French port* must be recognized by English Courts.

A Norwegian requisitioning decree of May 18, 1940, made after the German invasion of Norway but from Trondjhem in Norway where the Norwegian Government still was, came before the King's Bench Division in *Lorentzen v. Lydden & Co.*⁴ in 1941. Article 1 of the Decree is quoted later⁵ in connexion with *The Rigmor*. By Article 4, subsection 3, of the same Decree the Norwegian Minister of Shipping as 'curator' was 'entitled to collect claims belonging to owners as

¹ [1918] 2 K.B. 123; [1919] 1 K.B. 39.

² 35 L.Q.R. at p. 42.

³ [1927] P. 122, 144. The Court of Appeal (*ibid.* 250) did not dissent and had no occasion to do so.

⁴ [1922] 2 K.B. 202.

⁵ At p. 76.

mentioned in Articles 1 and 2, to enforce by action any claims that [they] may already have, or which they may later acquire, to effect compromises or accept settlements and give valid discharges'. The Norwegian curator sued to recover damages for breach of a charter-party in relation to a ship which had been sunk in April, 1940, and had belonged to a Norwegian company which fell within the scope of the Decree. The claim was resisted on the ground, amongst others, that it could not have extraterritorial effect, but Atkinson J. rejected this plea and upheld the curator's claim. 'To suggest', he said, 'that the English courts have no power to give effect to a decree making over to the Norwegian Government ships under construction in this country seems to me to be almost shocking.' The judgment is an important one on the extraterritorial effect of foreign decrees, but the case of the requisitioning of ships was not directly in question.

*The Cristina*¹ again is disappointing. The question whether a requisitioning decree of the (Republican) Spanish Government could operate upon a Spanish ship which had not been in Spanish waters since the date of the decree and was lying in the port of Cardiff when actually requisitioned was argued,² but it was unnecessary to decide it, because the Spanish Government had in fact acquired possession of the ship and that possession must be recognized and protected by an English Court. Lord Wright said:³

'It must also be noted in the present case that the *Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land. But as the relevant fact here is that the Spanish Government had in fact requisitioned her, there is no need to consider whether in any sense, or to what extent, she was subject while in English territorial waters to the law of her flag, or to the operation of the Spanish decree.'

She was registered in the port of Bilbao which at the date of the requisitioning decree was within the control of the (Franco) Nationalist Government.

Several other cases involving a requisition during the Spanish Civil War were similarly decided on the ground of governmental immunity based on actual possession, and shed no light upon the scope of operation

¹ [1938] A.C. 485, and in particular Lord Wright's speech. And see the analysis of this case in *British Year Book of International Law*, 1938, pp. 243-247. See also *The Kabalo* [1940] 67 Lloyd's List Law Reports, p. 272; *Annual Digest*, 1938-1940. Case No. 92 (a Belgian requisition of a Belgian ship when lying in a foreign port).

² [1938] A.C. at p. 488.

³ [1938] A.C. at p. 509.

of a requisitioning decree.¹ On the other hand, in *The El Condado*,² by reason, I think, of the Scottish procedure connected with the grant of an interim injunction, it became possible and necessary to discuss the scope of the requisitioning decree, because the defendant was not a Spanish Government but a Scottish bank which had become a surety upon the grant of the injunction. Both Divisions of the Court of Session rejected the contention that the Spanish requisitioning decree operated upon Spanish ships lying in Scottish waters.³

In *The Navemar*⁴ a series of American Courts had to deal with the effect of a Spanish requisitioning decree upon a Spanish ship which at the date of the decree was lying in an Argentine port. The operation of the decree was finally upheld, but it was pointed out that it was not necessary to the decision to say that the decree operated upon her while in Argentine waters, because even if it did not operate while she was there it 'would become operative upon the vessel as soon as she reached the high seas'. A large number of American decisions upon these Spanish requisitioning decrees have recently been examined by Professor Preuss⁵ in the *American Journal of International Law*, and there appears to be a tendency for the American Courts to regard merchant ships, for the purpose of requisitioning, as 'quasi-territorial', so that the requisitioning of a ship outside the territorial waters of the requisitioning State 'is not an extraterritorial exercise of State authority'. In one case it was said that that jurisdiction over ships 'partakes more of the characteristics of personal than of territorial sovereignty'.

¹ *The Arratz*, 61 Lloyd's List Law Reports (1938), p. 140; *The El Neptuno*, 62 *ibid.* (1938), p. 7; *The Arantzazu Mendi* [1939] A.C. 256 (all reported in *Annual Digest*, 1938-1940). See the analysis of the decisions of Bucknill J. and the C.A. in *The Arantzazu Mendi* in *British Year Book of International Law*, 1939, pp. 151-154.

² (In the Sheriff Court) 59 Lloyd's List Law Reports (1937), p. 119; *Annual Digest*, 1938-1940, Case No. 90; in the Court of Session 63 Lloyd's List Law Reports (1939), pp. 83 and 330; [1939] Session Cases, 413; *Annual Digest*, 1938-1940, Case No. 77.

³ The following foreign decisions upon the requisitioning of ships may be mentioned, though they do not throw light upon the point under discussion: *Agusquiza and the Spanish Government v. Société Sota y Aznar*, *Annual Digest*, 1935-1937, Case No. 70; *Larrasquitu and the Spanish State v. Société Cementos Rezola*, *ibid.*, No. 71; *The S.S. Baurdo*, *ibid.*, No. 73; *The Sandeja*, *ibid.*, No. 80; *Urrutia and another v. Martiarena*, *ibid.*, No. 94; *The Rita Garcia* (1937), 59 Lloyd's List Law Reports, 140; *Lafuente v. Laguno y Duranona*, *Annual Digest*, 1938-1940, Case No. 55; *Saez Mura v. Pinillos and Garcia*, *ibid.*, No. 95.

⁴ 59 Lloyd's List Law Reports, 17; 62 *ibid.*, 76; 64 *ibid.*, 220; *Annual Digest*, 1938-1940, Case No. 68; discussed above at pp. 378, 379.

⁵ Vol. 36 (1942), pp. 37-55. For the continental European decisions arising out of the Spanish Civil War, he refers to Jaenicke in 9 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1939), pp. 354-382.

In *Ervin v. Quintanilla*¹ a United States Circuit Court of Appeal gave effect to a plea of State immunity in a case where the foreign Government 'peaceably, but fully and completely, and in every way possible, took possession of the vessel for the Republic of Mexico', the vessel being in an American port when she was requisitioned.

In *The Laurent Meeus*² three United States Courts, including the Supreme Court, had to consider the effects of the requisition by the Belgian Government of a Belgian vessel while lying in an American port under a charter. The validity of the requisition was not directly in question and it appears to have been assumed that the Belgian Government acted within its powers through the instrumentality of the local Belgian consul.

Professor Preuss, after suggesting that 'where a government has jurisdiction, whether personal or territorial, over the owner or those who have custody of a vessel, the vessel itself is within the jurisdiction of that government for purposes of subjecting it to a decree of requisition', concludes a review of the American cases by submitting on this point that³

'For purposes of requisitioning, a national vessel is considered as quasi-territorial.' Therefore, the requisitioning of a ship while it is on the high seas (or, *semble*, while it is within the territorial waters of another State) is not an extraterritorial exercise of State authority.'

The Norwegian requisitioning Decree of May 18, 1940, already referred to, received judicial consideration in Sweden in 1942. Article 1 of the Decree purported to requisition

'All ships registered in Norway or belonging to a port there and situate outside the area in Norway which is occupied by an enemy power and which are owned by (a) persons domiciled in the occupied area or carrying on business from an office there, (b) part ownerships, corporations, joint stock companies or other companies registered in or having their board of directors in such area or carrying on business from an office there....'

In *The Rigmor*⁴ the Supreme Court of Sweden had no difficulty in

¹ (1938) 99 F. (2d) 935; 306 U.S. 635 (1939); cited by Preuss, *op. cit.*, at p. 32.

² 43 F. Supp. 807; 133 F. (2d) 552; certiorari denied, 318 U.S. 781; *Annual Digest*, 1941-1942, Case No. 35. I have not seen the original reports.

³ *Op. cit.* at p. 55. See also Beale, *Conflict of Laws*, § 63. 1, with no special reference to ships or requisitioning, 'a state... has power to command its own citizens wherever they may be'. The question of enforcing those commands is quite a different matter.

⁴ *American Journal of International Law*, xxxvii (1943), pp. 141-151; *Annual Digest*, 1941-1942, Case No. 63.

holding that this Decree operated upon the *Rigmor* which was in Swedish waters at the date of the decree. The Court pointed out that

'The carrying into effect [of a State process of requisitioning] can occur even without the collaboration of the owner of the requisitioned object, and this will particularly be the case if the owner [as happened in this case] is in territory occupied by an enemy State. It is true that the carrying into effect within the territory of another State cannot take place under compulsion and be legally binding. But if, as in the present case, it takes place with the consent of the immediate possessor *and especially if the latter is a subject of the requisitioning State and holds the position of captain of the vessel affected by the requisitioning*,¹ it can only be regarded as not legally binding on the assumption that the decree on which the execution is based is such that because of its departure from the fundamental principles of the law of our country it ought not to be taken into account. This cannot be said to be the case with the Norwegian requisitioning decree.'²

One way of approach in dealing with a requisition by a foreign Government is to treat it as a governmental act which the Courts of another country cannot investigate. In *The Adriatic*,³ where the British Admiralty requisitioned a British ship on the high seas, proceedings took place in two Federal Courts of the United States of America (a District Court and a Circuit Court of Appeals), in which the requisition was challenged by the charterers on the ground that the ship was not in British waters at the time of the requisition. The District Court declined 'to adjudicate any claim of right advanced by the libellant which grows out of the requisitioning of the respondent vessel by the government to which its master and owners owe the duty of obedience', and the Circuit Court of Appeals likewise treated the question as 'not justiciable'.

Some Text-writers

Note 29, Part II, in the Appendix to Dicey, contains the following passage:⁴

'It is, in fact, impossible to accept the view of a ship as being in the same position as an ordinary movable, so that its *lex situs* is the law of

¹ The words which I have italicized are reminiscent of the notion of allegiance which, as has already been noted, is an important element in the British power of requisitioning ships.

² The Court also held that the vessel, being in the possession of the British Government by virtue of a demise charter, was immune from arrest by reason of the plea of State immunity.

³ (1918) 253 Fed. 489; (1919) 258 Fed. 902; *Annual Digest*, 1919-1922, Case No. 9.

⁴ 5th ed., p. 996.

any place where it may be for the time being. Admittedly, some law must apply to it when on the high seas, and this law clearly ought to be the law of the ship's flag, on the assumption that that law recognizes the ship as entitled to the colours which it bears. It is, therefore, sound in principle to ascribe to a ship a *situs* in the country to which she belongs as is in effect done by the legislation which applied probate duty in respect of ships registered in the United Kingdom, although at sea or elsewhere at the time of the death of the testator or intestate.¹

The word 'belongs' is doubtless used in the same sense in which section 13 of the Merchant Shipping Act, 1894, provides that the port of registration of a British ship is 'the port to which she belongs'.

Westlake² fails to state a clear principle and certainly cannot be claimed as a supporter of the view stated in Dicey's Appendix quoted above.

Beale³ has a section entitled *Jurisdiction over Things outside the State*, in which he says that: 'A State has jurisdiction over a chattel outside its boundaries only in certain cases', of which one is 'If the chattel is habitually kept within the State, but is temporarily outside it', and in section 50. 5 he mentions the case of a motor-car having its headquarters in a garage in one State and temporarily travelling outside it. But I do not think that the statement applies to a ship.

Martin Wolff⁴ attributes to all means of transport, railway rolling-stock, motor-cars, aircraft, 'some fixed resting place, in which they are as it were resident, even if temporarily absent. In the case of sea-going ships, the law of the flag replaces the *lex situs*. . . . Thus a ship while on the high seas or in a foreign port can be alienated or mortgaged according to the law of the flag or the port of registration. . . .'

CONCLUSION

In conclusion, the following propositions upon the right to requisition British merchant ships while they are outside British national or territorial waters are submitted:

(1) that the matter is not yet settled by English decisions and that it is therefore both right and necessary to have regard to historical practice, to considerations of public policy and to the decisions of foreign Courts:

(2) that it has been the undoubted English practice for many centuries to requisition English ships outside English waters, both on the high seas and in foreign waters:

¹ Revenue (No. 2) Act, 1864, s. 4.

² 7th ed., pp. 197-206.

⁴ *Private International Law*, p. 530.

³ *Conflict of Laws*, §§ 99. 1 and 471. 6.

(3) that the inherent characteristics of merchant ships, as a part of the war potential of the nation and by reason of their legal dependence on their port of registry, distinguish them from ordinary movable chattels:

(4) that for the purposes of executive action in time of war or other national emergency the Crown has by virtue of the permanent and personal allegiance owed to it by British subjects a jurisdiction to issue orders to them as to the disposal, in the national interest, of their property, even though it be outside British territory and waters:

(5) that the importance of the law of the flag in the internal life of a British merchant ship and in the mercantile transactions with which she is concerned makes it not unreasonable that, for the purposes of executive action, she should be regarded as remaining within British territorial jurisdiction, wherever she may be physically:

(6) that the American decisions indicate a tendency towards giving extraterritorial effect to a requisitioning decree:

(7) that for the foregoing reasons the Crown has the right to requisition British merchant ships whether they are in British waters, on the high seas or in foreign waters, and to enforce that requisition upon them anywhere except in foreign waters.

Conversely, the British Government and Courts should recognize a corresponding right in other States.

ARNOLD D. McNAIR

APPENDIX V

LIMITATION (ENEMIES AND WAR PRISONERS)

ACT, 1945

An Act to provide for suspending the operation of certain statutes of limitation in relation to proceedings affecting persons who have been enemies or have been detained in enemy territory. [28th March 1945]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) If at any time before the expiration of the period prescribed by any statute of limitation for the bringing of any action any person who would have been a necessary party to that action if it had then been brought was an enemy or was detained in enemy territory, the said period shall be deemed not to have run while the said person was an enemy or was so detained, and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained, or from the date of the passing of this Act, whichever is the later:

Provided that, where any person was only an enemy as respects a business carried on in enemy territory, this section shall only apply, so far as that person is concerned, to actions arising in the course of that business.

(2) If it is proved in any action that any person was resident or carried on business or was detained in enemy territory at any time, he shall for the purposes of this Act be presumed to have continued to be resident or to carry on business or to be detained, as the case may be, in that territory until it ceased to be enemy territory, unless it is proved that he ceased to be resident or to carry on business or to be detained in that territory at an earlier date.

(3) If two or more periods have occurred in which any person who would have been such a necessary party as aforesaid was an enemy or was detained in enemy territory, those periods shall be treated for the purposes of this Act as one continuous such period beginning with the beginning of the first period and ending with the end of the last period.

2. (1) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say:

'action' means civil proceedings before any court or tribunal and includes arbitration proceedings;

'enemy' means any person who is, or is deemed to be; an enemy for any of the purposes of the Trading with the Enemy Act, 1939, except that in ascertaining whether a person is such an enemy the expression 'enemy territory' in section two of the said Act shall have the meaning assigned to that expression by this section;

'enemy territory' means:

(a) any area which is enemy territory as defined by subsection (1) of section fifteen of the Trading with the Enemy Act, 1939;

(b) any area in relation to which the provisions of the said Act apply, by virtue of an order made under subsection (1A) of the said section fifteen, as they apply in relation to enemy territory as so defined; and

(c) any area which, by virtue of Regulation six or Regulation seven of the Defence (Trading with the Enemy) Regulations, 1940, or any order made thereunder, is treated for any of the purposes of the said Act as enemy territory as so defined or such territory as is referred to in the last foregoing paragraph;

'statute of limitation' means any of the following enactments, that is to say,

the Limitation Act, 1939,

section three of the Fatal Accidents Act, 1846,

section four of the Employers' Liability Act, 1880,

section ten of the Copyright Act, 1911,

section eight of the Maritime Conventions Act, 1911,

Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Act, 1924,

subsection (1) of section thirteen of the Moneylenders Act, 1927,

Article 29 of the First Schedule to the Carriage by Air Act, 1932,

section one of the Law Reform (Miscellaneous Provisions) Act, 1934,

subsection (1) of section seven of the Matrimonial Causes Act, 1937.

(2) References in this Act to any person who would have been a necessary party to an action shall be construed as including references to any person who would have been such a necessary party but for the provisions of section seven of the Trading with the Enemy Act, 1939, or any order made thereunder.

(3) References in this Act to the period during which any person was detained in enemy territory shall be construed as including references to any period immediately following the period of such detention during which that person remained in enemy territory.

(4) Subsection (2) of section fifteen of the Trading with the Enemy Act, 1939 (which provides that a certificate of a Secretary of State shall, for the purposes of proceedings under or arising out of that Act, be conclusive evidence of certain matters affecting the definition of 'enemy territory') shall apply for the purposes of any action to which this Act relates.

(5) References in this Act to any enactment or to any Defence Regulation shall be construed as referring to that enactment or Regulation as amended by any subsequent enactment or Defence Regulation.

3. This Act shall apply to proceedings to which the Crown is a party, including proceedings to which His Majesty is a party in right of the Duchy of Lancaster and proceedings in respect of property belonging to the Duchy of Cornwall.

4. In the application of this Act to Scotland

(a) for subsection (1) of section one the following subsection shall be substituted:

'(1) If, during any period of less than ten years prescribed by any of the enactments hereinafter referred to as the period within which any action or diligence must be raised or executed or on the expiry of which any limitation on the mode of proof in any action becomes operative or any obligation is extinguished, any person who would have been a necessary party to such action or who was a party to such obligation was an enemy or was detained in enemy territory, the period so prescribed shall be deemed not to have run while the said person was an enemy or was so detained and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained or from the date of the passing of this Act whichever is the later:

Provided that where any person was only an enemy as respects a business carried on in enemy territory, this section shall only apply so far as that person is concerned to actions or obligations arising in the course of that business.

The enactments hereinbefore referred to are:

the Act of the Parliament of Scotland, 1579 cap. 21,

the Act of the Parliament of Scotland, 1669 cap. 14,

the Act of the Parliament of Scotland, 1695 cap. 7,

section thirty-seven of the Bills of Exchange (Scotland) Act, 1772,

section four of the Employers' Liability Act, 1880,

section one of the Public Authorities Protection Act, 1893,

section ten of the Copyright Act, 1911,

section eight of the Maritime Conventions Act, 1911,

Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Act, 1924,
subsection (1) of section thirteen of the Moneylenders Act, 1927,
Article 29 of the First Schedule to the Carriage by Air Act, 1932;

- (b) in subsection (3) of section one after the words 'necessary party' there shall be inserted the words 'or was a party to such obligation'.

5. In the application of this Act to Northern Ireland, the expression 'statute of limitation' means any enactment (whether of the Irish Parliament or of the Parliament of the United Kingdom or of the Parliament of Northern Ireland) in force in Northern Ireland at the date of the passing of this Act under which a period is prescribed as the period within which any action to which such enactment relates is required to be brought, but does not include any enactment prescribing a period within which any criminal proceedings, or any proceedings to recover any penalty imposed as a punishment for a criminal offence, or any proceedings before a court of summary jurisdiction must be brought.

6. (1) This Act may be cited as the Limitation (Enemies and War Prisoners) Act, 1945.

(2) This Act shall be deemed to have had effect as from the third day of September, nineteen hundred and thirty-nine.

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